65577

VOL. I.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

STANFORD STATE LIBRARY

No. 396.

WILLIAM R. WILLCOX ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT, APPELLANTS,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 397.

THE CITY OF NEW YORK, APPELLANT,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

No. 398.

WILLIAM S. JACKSON, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, APPELLANT,

vs.

CONSOLIDATED GAS COMPANY OF NEW YORK.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 16, 1906.

(21,176, 21,177, 21,178.)

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INDEX TO VOL. I

ALSO

INDEX OF COMPLETE RECORD.

See Special Index in Each Volume.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1908.

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129—Deed of Joel A. Fithian to Richard B. Connolly, dated July 6, 1871	7472	5134
130—Deed of Richard B. Connolly to C. S. Bushnell *et al.*, dated November 25, 1871	7474	5135

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Complainant's Exhibit 131—Deed of Walter Smith to C. S. Bushnell *et al.*, dated Nov. 28, 1871...	7477	5136
132—Deed of Joseph Murphy to Forbes Holland, dated July 13, 1871....	7479	5138
133—Deed of Forbes Holland to C. S. Bushnell *et al.*, dated November 25, 1871.....	7481	5139
134—Deed of Edward Taylor to Wm. M. Tweed, Jr., dated July 3, 1871...	7484	5140
135—Deed of Wm. M. Tweed, Jr., to C. S. Bushnell *et al.*, dated November 27, 1871.....	7486	5141
136—Deed of John E. Cronley to Alexander Frear, dated July 18, 1871.	7488	5143
137—Deed of George H. Wicks to Alexander Frear, dated November 24, 1871.....	7490	5144
138—Deed of Alexander Frear to C. S. Bushnell *et al.*, dated November 24, 1871.....	7492	5145
139—Deed of Joseph G. Jennings to Charles Banks, dated June 28, 1871.....	7494	5146
140—Deed of Charles Banks to C. S. Bushnell *et al.*, dated November 25, 1871.....	7496	5147
141—Deed of Henry Johnson to Wm. Hitchman, dated November 24, 1871.....	7499	5149
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143—Deed of Edward J. Shandley to C. S. Bushnell *et al.*, dated November 25, 1871.....	7503	5151
144—Deed of John C. Angell to James M. Sweeney, June 21, 1871.....	7506	5153
145—Deed of James M. Sweeney to C. S. Bushnell *et al.*, dated November —, 1871.....	7507	5154
146—Deed of Wm. Vail to Thomas C. Fields, dated June 14, 1871.....	7512	5156
147—Deed of Patrick Quinn to Thomas C. Fields, dated June 14, 1871...	7514	5157
148—Deed of Wm. H. Murphy to Thomas C. Fields, dated June 14, 1871.....	7516	5159
149—Deed of Wm. Higgins to Thomas C. Fields, dated June 26, 1871...	7518	5160
150—Deed of John H. Johnston to Thomas C. Fields, dated June 14, 1871.....	7521	5161

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Complainant's Exhibit 151—Deed of George Chivvis to Thomas C. Fields, dated July 6, 1871....	7523	5163
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153—Deed of Richard Vaughan to George L. Loutrel, dated July 3, 1871.....	7528	5165
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155—Deed of Andrew J. Smith to C. S. Bushnell *et al.*, dated November 25, 1871.....	7532	5168
156—Deed of Henry A. Smith to C. S. Bushnell *et al.*, dated November 6, 1871.....	7534	5169
157—Deed of Joseph Bell to C. S. Bushnell *et al.*, dated November 25, 1871.....	7538	5171
158—Deed of John J. Walsh to C. S. Bushnell *et al.*, dated December 30, 1871.....	7540	5173
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160—Deed of Thomas T. Avery to A. Oakey Hall, dated June 29, 1871.	7545	5175
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163—Deed of James S. Turner to Wm. M. Tweed, dated July 3, 1871...	7551	5179
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165—Deed of Wm. Johnston to John Ryan, dated December 16, 1871.	7556	5181
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168—Deed of Peter B. Sweeney to C. S. Bushnell *et al.*, dated July 3, 1871.....	7563	5186
169—Deed of Peter H. E. Baxter, Jr., to Henry W. Genet, dated June 16, 1871.....	7566	5187

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172—Deed of John J. Turner to Wm. E. King, dated July 3, 1871	7572	5191
173—Deed of Wm. E. King to James F. Pierce, dated June 12, 1871	7574	5192
174—Deed of James F. Pierce to C. S. Bushnell *et al.*, dated November 25, 1871	7576	5193
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176—Deed of Charles E. Wilbour to C. S. Bushnell *et al.*, dated November 27, 1871	7580	5195
177—Deed of Charles E. Loew to C. S. Bushnell *et al.*, dated November 25, 1871	7583	5197
178—Deed of Mathew T. Brennan to C. S. Bushnell *et al.*, dated November 25, 1871	7585	5198
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180—Same as No. 120 (not set out here)	7589	5200
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183—Deed of Cornelius S. Bushnell *et al.* to James M. Townsend, dated February 14, 1874	7594	5204
184—Deed of Cornelius S. Bushnell *et al.* to Samuel J. Young, dated February 14, 1874	7597	5205
185—Deed of Cornelius S. Bushnell *et al.* to Charles E. Appleby, dated February 14, 1874	7600	5207
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	Original.	Print.
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199—Consent of the Knickerbocker Gas Light Company, dated May 20, 1878.....	7645	5233
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204—Deed of Tilton E. Doolittle to Oliver P. C. Billings, dated May 20, 1878.....	7655	5239
205—Deed of Robert M. C. Graham to M. Bayard Brown, dated May 20, 1878.....	7658	5240
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207—Deed of Walter Osborn to Wm. Bayard Cutting, dated May 20, 1878.....	7663	5243

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210—Deed of M. Bayard Brown to Henry Day, dated March 11, 1880	7669	5247
211—Deed of Robert F. Cutting to H. E. Gawtry, dated March 11, 1880	7671	5248
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217—Chapter 125, An act in relation to illuminating gas in the city of New York, and regulating the quality and pressure thereof and the price to consumers other than said city, and providing a penalty for violation; accepted by the city; became a law April 3, 1906	7692	5263
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1 Circuit Court of United States, Southern District of New York. In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The Consolidated Gas Company of New York, a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the County of New York, and in the Borough of Manhattan, City of New York, in the Southern District of New York, brings this its bill of complaint against Julius M. Mayer, of the Borough of Manhattan, City of New York, who is the Attorney General of the State of New York, William Travers Jerome, of the Borough of Manhattan, City of New York, who
2 is the District Attorney of New York County, Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, all citizens and residents of the State of New York, who constitute the State Commission of Gas and Electricity of the State of New York, as is hereinafter more particularly set forth, the said Commission having an office in the Borough of Manhattan, City of New York, in the Southern District of New York, and the City of New York, which is a municipal corporation, organized and existing under the laws of the State of New York and situated in the Southern District of New York; and thereupon your orator alleges, upon information and belief, and complains:

I. That your orator is a corporation, duly incorporated for the purpose of manufacturing and selling gas in the City and County of New York, under and by virtue of a Consolidation Agreement, duly executed on September 29, 1884, pursuant to a statute of the State of New York, entitled, "An Act to Authorize the Consolidation of Manufacturing Corporations," known as Chapter 367 of the Laws of 1884, which became a law on May 28, 1884. The said Consolidation Agreement was executed by and on behalf of the New York Gas Light Company, The Manhattan Gas Light Company, The Metropolitan Gas Light Company of the City of New York, The Municipal Gas Light Company of New York, The Knickerbocker Gas Light Company and The Harlem Gas Light Company, all of which were corporations theretofore duly organized and existing under the laws of the State of New York, with the property, powers and franchises hereinafter referred to. The said Agreement was, thereafter, duly

filed in the office of the Secretary of State of the State of New York and of the Clerk of New York County, on November 10, 1884, pursuant to the said statute. Your orator was duly organized as a corporation thereunder, to continue for fifty years by virtue of the said Consolidation Agreement and of the aforesaid statute; but, under the laws of New York, its corporate existence may, at any time, be extended, upon the consent of two-thirds in amount of the stockholders.

3 II. That by virtue of the said Consolidation Agreement, your orator became the owner of various franchises or consents, duly obtained by its said predecessor Companies, authorizing them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places of the City and County of New York; and it further became the owner of, and entitled to maintain, and operate mains, pipes and conductors theretofore laid in the various streets, highways and public places, in the said City and County of New York by the said predecessor Companies; and it also became thereby the owner of large and expensive works for the manufacture and distribution of gas, which had been erected by the said various predecessor Companies. Your orator has, ever since, been engaged in the business of manufacturing and selling gas to the inhabitants of the said City and County of New York and to the City of New York, and has maintained and operated the said mains, pipes and conductors in the said streets, highways and public places of the said City and County of New York, and has laid additional mains, pipes and conductors therein, with the consent of the municipal authorities of the said City duly obtained. In addition to your orator and the various constituent companies, whose property and franchises were acquired by it, as aforesaid, there were, at the time *af* such acquisition, and have since been organized and now are, other gas companies engaged in the manufacture, sale and distribution of gas in the City of New York, as well as a number of electric light companies engaged in distributing electric light to the inhabitants of the said City.

III. That by virtue of various laws of the State of New York, enacted subsequent to the said Consolidation Agreement, and to which your orator is subject, your orator has been charged with the performance of various public duties and obligations, to wit:

4 By Chapter 566 of the Laws of 1890, known as "The Transportation Corporations Law," with the duty of supplying gas to the owner or occupant of any building or premises within one hundred feet of any main laid down by your orator, with the duty of furnishing gas meters to its consumers, without rent or charge, and with the duty of furnishing illuminating gas at a price not exceeding a certain amount, fixed in the said Act, having an illuminating power prescribed by the said Act and the standard of purity established by law.

Your orator has duly complied with all the requirements of the said several statutes.

IV. That by Chapter 736 of the Laws of 1905, which became a law on or about June 3, 1905, it was provided that a corporation, engaged in the business of furnishing or selling illuminating gas

in the City of New York, should not charge the said City, or receive therefrom, for such gas, a sum in excess of seventy-five cents per thousand cubic feet. It was further provided by the said Act, that the gas furnished or sold by such corporation to the said City should have a certain illuminating power and standard of purity therein prescribed, and that the pressure of the said gas in any service mains in the said City should not be less than one inch, nor more than two and one-half inches, and that any corporation violating any provision of the said Act should forfeit the sum of one thousand dollars for each offense, to be sued for and recovered in the name of and by the City of New York, for its benefit. A copy of the said statute is hereto annexed, marked "Exhibit A."

V. That by Chapter 737 of the laws of 1905, provision was made for the appointment of a State commission of Gas and Electricity by the Governor of the State of New York; and, thereafter, the defendants, Frederic E. Gunnison, John C. Davies and Lucian L. Shedden were appointed such Commissioners by the said Governor. The said Act purported to give the said commission general supervision of all persons and corporations having authority to lay down
5 pipes and other fixtures in or under the streets, highways and public places of any municipality in the State of New York, for the purpose of furnishing gas for light, heat or power; to investigate the quality of gas supplied; to examine the methods used in supplying gas or in transmitting the same; to order such improvements as would best promote the public interests, preserve the public health and protect consumers of gas and those employed in the manufacture and distribution thereof; to fix the standard of illuminating power and purity of gas manufactured and sold for illuminating purposes, not less than that prescribed by law; to require the gas so manufactured and sold to equal the standard established by law or by said Commission, and to establish a standard of pressure at which gas should be delivered; to prescribe the methods of keeping accounts and books to be observed by corporations engaged in the manufacture, sale and distribution of gas; to examine all corporations under its supervision, keep informed as to the methods employed by them, and see that their property is maintained and operated for the security and accommodation of the public and in compliance with their charters; to require the corporations under its supervision to submit an annual report verified by the oath of the President or other officer, showing in detail the amount of its capital stock, the amount of its indebtedness, and of its receipts and expenditures during the preceding year, the amount of its dividends, the amount of salaries paid, the location of its plant and system, and other facts required by the Commission; to enter upon the property, buildings, plants, factories and offices of such corporations, to examine the books and affairs of such corporations and to compel the production of their books and papers; to subpœna witnesses and inspect gas meters. It was further provided by the said Act that the capital stock and bonded indebtedness of such corporations could not be increased without the consent in writing of the said Commission, and that no such corporation should transfer or
6 lease its franchises, works, system or property, or any part thereof, or acquire, directly or indirectly, the stock or

bonds of any other corporations engaged in the same or similar business, without the written consent of the said Commission. In case such consent should be refused by the said Commission, the applicant was given the right, within sixty days after notice of said refusal, to have the ruling reviewed by the Appellate Division of the Supreme Court of this State for the Third Department.

It was further provided by the said Act that, upon complaint in writing by the Mayor of a City, or of not less than one hundred customers, either as to illuminating power, purity, pressure or price of gas sold and delivered, the Commission should investigate such complaint, should have power to inspect the works of the corporation manufacturing such gas and to examine the books and papers of such corporation, and, after public hearing, at which the complainants and the corporation complained of should have an opportunity to be heard and be represented by counsel, should have power to fix, within the limits prescribed by law, the maximum price of gas which should be charged by such corporation, or to order such improvement in the manufacture or supply of such gas, or in the methods employed by such corporations, as would, in its judgment, improve its service; and that the price so fixed by the Commission should be the maximum price to be charged by said corporation for gas for the term of three years and until, after such term, the Commission should, upon complaint, again fix the price of such gas. The said Act further provided that the complainant, or any person aggrieved by any order of the Commission, might, within thirty days after notice of the making of such order, appeal to the Appellate Division of the Supreme Court of this State for the Department, within which the property of the corporation affected by such order was situated, and that the said Court might affirm, reverse in whole or in part, or modify, the order appealed from, or make such order as it might deem just and proper; and that, on all
7 such appeals, the Commission should be represented by the Attorney General. The said Act further provided, that an order made by the said Commission pursuant thereto, or, in case of an appeal, the order as affirmed or modified or made upon such appeal, might be enforced by writ of mandamus, and that the Commission or any person, corporation or municipality interested in the enforcement of such order might apply to the Supreme Court for a writ of mandamus to compel compliance with such order; and the said Court was given the power to issue a writ of mandamus to enforce the provisions of such order. The said Act further provided that, if it should be alleged and established, in an action brought in any court for the collection of any charge for gas, that a price had been demanded in excess of that fixed by said Commission or by statute, no recovery should be had therein, but the fact of such excessive charge should be a complete defense to such action. A copy of the said statute is hereto annexed, marked, "Exhibit B."

Your orator is also charged with the duty, at common law, of exercising the highest degree of care in the conduct of said business, to prevent injury to persons or property due to the inflammable, explosive and poisonous character of the commodity manufactured

and distributed in the performance of the aforesaid duties and obligations.

VI. That the defendant, the City of New York, is a domestic municipal corporation, organized and existing under the laws of the State of New York, and situated in the Southern District of New York. The said City of New York itself is, and for many years last past, has been, a customer of your orator, in the same sense and in the same way and under the same legal conditions as each and every other customer of your orator in the said City; and the amount of your orator's gas, consumed by the said City during the year 1905, was nearly 400,000,000 cubic feet.

VII. That the defendants, Gunnison, Davies and Shedden, at the time of the matters herein referred to, constituted and still
8 constitute the Commission of Gas and Electricity of the State of New York, established by the said Act, Chapter 737 of the Laws of 1905, and have an office for the transaction of the business and affairs of the said Commission in the Borough of Manhattan, City of New York, in the Southern District of New York. The said Act purported to confer upon the said Commissioners the power, from time to time, to fix and determine the maximum price at, which your orator might sell its gas to the inhabitants of the City of New York, and to enforce compliance with their said orders, fixing the maximum price of gas, by applying for a writ of mandamus. Compliance with such orders may also be enforced, under the said Act, by an application for a writ of mandamus, made by any person, corporation or municipality interested in the enforcement of such order.

VIII. That on or about November 8, 1905, your orator was notified by the said Commission that it had received in writing two complaints against your orator, each signed by one hundred or more consumers and purchasers of gas sold and delivered by your orator, requesting the said Commission to reduce the maximum price to be charged for gas by your orator to its customers in the City of New York. After a hearing by the said Commission on the said petitions, the said Commission, on or about February 23, 1906, made an order, a copy of which is hereto annexed, marked "Exhibit C," providing that on and after May 1, 1906, the maximum price for gas to be charged by your orator, in the Borough of Manhattan, City of New York, should be eighty cents per thousand cubic feet, and prescribing a standard of illuminating power and of purity, and making the same provision in regard to the pressure of gas in its service mains to be supplied to its private consumers, as was made by Chapter 736 of the Laws of 1905, hereinbefore referred to, in regard to the pressure of gas to be supplied to the City of New York. The said order requires a reduction of twenty cents per thousand cubic feet, from the reasonable price of one dollar per thousand cubic feet,
9 heretofore and now charged by your orator, as aforesaid, pursuant to Chapter 385 of the Laws of 1897, by which the maximum price of gas in the City of New York was fixed for the year 1901 and subsequently at $1 per thousand cubic feet.

IX. That by Chapter 125 of the Laws of 1906 of the State of

New York, which became a law on or about April 3, 1906, it was provided that no corporation, engaged in the business of manufacturing, furnishing or selling illuminating gas in the Borough of Manhattan, or in the Borough of The Bronx, except in that portion thereof contained in the former towns of Eastchester and Pelham and in the former town of Westchester outside the Villages of Wakefield and Williamsbridge, should charge for gas manufactured, furnished or sold in the said City, a sum in excess of eighty cents per thousand cubic feet. The said Act prescribed a standard of illuminating power and purity and of pressure of illuminating gas furnished by such corporations, and provided that any corporation violating any provision of the Act should forfeit the sum of one thousand dollars for each offense to the people of the State. It was further provided that the said Act should not apply to gas furnished or sold to the City of New York. A copy of the said statute is hereto annexed, marked "Exhibit D."

X. That your orator was originally incorporated by consolidation in the year 1884, pursuant to Chapter 367 of the Laws of New York of that year, as hereinbefore set forth. The said Act provided that the capital of the consolidated corporation, organized thereunder, should not be larger in amount than the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated. Pursuant to the authority conferred by the said Act, the property of the various Companies (exclusive of the franchises and rights hereinafter referred to), which entered into the Consolidation Agreement aforesaid, was carefully appraised by disinterested persons, and the fair value thereof was fixed at the sum of $29,994,000. The value of the franchises and rights of the said Companies was estimated at the sum of $7,781,000, and the aggregate value of the property, franchises and rights of the said Companies was accordingly fixed at the sum of $37,775,000; and this amount of stock was issued by your orator to the stockholders of the various constituent Companies in exchange for the property, franchises and rights of the said Companies. The issue of such stock, pursuant to authority conferred by the said Act of 1884, created a contract between your orator and the State of New York, under which your orator has the right to earn a fair return upon the stock so issued; and under Section 10 of Article I of the Constitution of the United States, the State of New York has no power to impair the obligation of the said contract. The authorized capital stock of your orator has, since then, been increased in various amounts and at various times, to the aggregate of $100,000,000, par value, $80,000,000, par value, of which is issued and outstanding. In the case of every increase, the Company has realized for the additional stock issued, either in cash or property, or in payment of indebtedness, an amount largely in excess of the par value of the stock so issued. Your orator has further duly issued for cash, at par, and there is now outstanding, in addition to said capital stock, $19,857,600 of six per cent. bonds or debentures, convertible, at par, into stock of your orator after July 1, 1907, and maturing on July 1, 1909.

For many years, your orator's capital stock has been favorably

known and regarded by the investing public, owing to the fact that your orator owns a large and valuable property, well located in a prosperous metropolitan community, and that the entire capitalization represents actual value, there being no underlying mortgages or liens upon the property which are prior to the rights of the stockholders therein. The said stock has been largely dealt in, and is widely held by stockholders not only in the State of New
11 York, but in many of the other States of this country, as well as abroad; and there are, at the present time, about five thousand registered holders of your orator's stock.

XI. That your orator has, ever since its incorporation, devoted large amounts of money to making all additional improvements and extensions to its plant and works, necessary to enable it to meet the increasing demands of the inhabitants of the City and County of New York for gas, as well as of the defendant, the City of New York, and to perform its said public duties, and had and owned, at the time of the order and statutes hereinbefore referred to and complained of, and now owns, plants, consisting of real estate, buildings, machinery, pipes and other apparatus, in good order and repair, suitable and actually used for the purpose of manufacturing and distributing gas in the said City and County of New York, representing a cost to your orator of about $40,000,000, and having a present cash value in excess of that amount, *exclusive* of any value of its franchises, goodwill or business; and your orator further has supplies and materials on hand necessary for the conduct of its said business, having a value in excess of $600,000 and a cash working capital necessary for the conduct of its said business of $1,000,000, and bills and accounts receivable, representing more than $2,000,000. Furthermore, your orator has found it necessary to provide a means of disposing of the by-products produced by it in the manufacture of gas, consisting of coal, tar and ammonia, and has invested capital to the extent of $50,000 in such business. Furthermore, your orator has found it necessary to provide an extensive additional plant, in order to meet the increase in the consumption of gas in the City and County of New York, and for that purpose has lawfully acquired, pursuant to the statutes of the State of New York, all the stock of a corporation, duly incorporated under the laws of the State of New York, for the purpose of manufacturing and supplying gas, with the corporate title of The Astoria Light, Heat and Power Company, which
12 has acquired land and erected buildings and improvements thereon at Astoria, in the former City of Long Island City, Borough of Queens, in the City of New York, at an expense of over $5,500,000. There is no mortgage, lien or indebtedness of the said Astoria Company which is not held entirely by your orator. The aggregate of these various items of capital, employed by your orator in its said business, is accordingly over $49,000,000. Furthermore, your orator had, at the time the said order of the said Commission was made, in addition to the said amount, the sum of $6,200,000 in cash, and a further sum in excess of $6,500,000 in temporary investments and loans, aggregating a sum in excess of $12,700,000 additional, temporarily held by your orator, pending the completion

of the said investment, now in progress, which your orator is making in its new plant at Astoria. Your orator's actual investment in its said business, accordingly, at the time the said order was adopted, was about $62,000,000, *exclusive* of the value of its franchise and rights and *exclusive* of the value of its other intangible property. Your orator has always performed its public duties in a manner satisfactory to the inhabitants of the City and County of New York; the quantity of gas furnished by it has been sufficient and the quality of such gas has been excellent and better than the average of the gas furnished by the gas companies in the State of New York. The business of your orator has always been managed in an economical and skillful manner, with the highest regard for the safety and convenience of the public. The prices, charged to the inhabitants of the City and County of New York by your orator for gas, have always been reasonable, and have been lowered by your orator, from time to time, as rapidly as was warranted by the decrease in the cost of manufacture and distribution, due to improvements, made and introduced by your orator in the manufacture and distribution of gas, to the economy and skill, with which the business of your orator has been conducted, and to the increase in the consumption of your orator's gas, or to other causes.

13 XII. That the price charged by your orator for its gas has been gradually reduced from $2.25 per thousand cubic feet, in 1884, to one dollar per thousand cubic feet in 1901; and the prices charged by your orator for its gas have always been as low as prices charged by other manufacturers of gas in communities corresponding in size and in other conditions to the said City and County of New York. The price of one dollar per thousand cubic feet for gas is lower than the average price charged throughout the State of New York. In view of the local conditions now prevailing in the City of New York and other conditions as to candle power, pressure and purity, and in respect to the cost of construction and labor, coal, naphtha, oil and other materials used in the manufacture of gas, the market for residuals or by-products, and the other conditions upon which the cost of manufacturing and distributing gas depends, the said price of one dollar per thousand cubic feet is relatively as low a price as the prices charged in any other city or town in the said State or elsewhere in the eastern part of the United States, and is as low as business prudence would have justified your orator in adopting and charging.

XIII. That since its organization, in 1884, your orator has declared and paid dividends to its stockholders, averaging much less than eight per cent. upon its capital stock; and the entire profits of your orator in the prosecution of its business, in excess of the said reasonable dividend, have been devoted to making such replacements, additions, extensions, improvements and acquisitions as have, from time to time, been necessary to enable your orator to carry on its business and to perform its said public duties. Your orator has constantly maintained, improved and extended its system of pipes, mains, feeders and plants; and, in the regular growth and evolution of your orator's business, it has been and will continue to be neces-

sary to abandon and remove many miles of gas mains in the streets of said City and County (which are no longer available for
14 use in distributing gas, because they were laid at an early day, were small in size), and to lay and maintain new and enlarged pipes and mains. Several hundred miles of gas mains and pipes have been newly laid by your orator in all sections and divisions of the City and County of New York, since your orator acquired the aforesaid properties, in extending, enlarging, improving and bettering your orator's plant and system. In order to enable your orator to comply with the duties and obligations imposed upon it by law, as herein stated, and in extending and enlarging its said gas works and system, it has, since its organization in 1884, rebuilt or enlarged all of the manufacturing plants acquired, as aforesaid; it has acquired additional real estate and built and constructed additional buildings thereon, and installed in the buildings so erected, and in the buildings acquired as aforesaid, new and improved machinery and appliances for the production and distribution of gas; and it has expended in doing said work and in extending, enlarging, replacing, repairing and connecting its system of pipes, mains, services and feeders, over $17,000,000.

XIV. That, in order to enable your orator to carry on its business, as authorized by its charter and the general laws of the State of New York, to fulfill and perform its public duties, as hereinbefore set forth, and to take all reasonable precautions against accidents to persons and property, it is necessary for your orator to charge a price for gas sufficient to cover or include the following items: (1) the reasonable cost of the materials, wages, repairs, insurance, taxes, office expenses, superintendence and expenses of management and such other expenses as are reasonably necessary, as part of the current annual cost of manufacturing and distributing gas in the said City and County of New York; (2) a reasonable allowance or charge to offset the depreciation in the value of its plant, that is to say, to enable your orator to defray the cost (in excess of the amount
15 expended on repairs) of renewing such portions of the said plant as may, from time to time, wear out (notwithstanding the same are kept by your orator in as good condition and repair as possible) to meet the cost of such changes in machinery and apparatus, as may, from time to time, be rendered necessary by the discovery and invention of better or more economical methods of manufacture, and to make good the loss occasioned, from time to time, by the abandonment of certain portions of the said plants, due to the occasional necessity for the reconstruction or enlargement of its works and to meet any other expenditures or losses necessary to be met, in order that your orator's plant may not, at any time, become depreciated in efficiency or value. In order to enable your orator to meet the constantly increasing demand for gas, it is necessary for your orator, from time to time, to make large additions to its plant in excess of such additions as are necessary, as hereinbefore set forth, to prevent the said plant from shrinking in efficiency or value through depreciation. Since the organization of your orator in 1884, as aforesaid, it has been necessary to expend a very

large amount annually in repairs and replacements of your orator's building, plant, equipment, mains and services, owing to the extension of your orator's business and the increase in the number of consumers of your orator's gas; and the total of such expenditures up to the present time exceeds the sum of $17,000,000, and the amount of such expenditures has increased and will increase annually. Furthermore, during the same period, it has been necessary every year to increase the amount of your orator's investment in real estate, plant, property and construction. The amount of such increased investment aggregates about $10,000,000, or at the rate of about $500,000 a year. It will be necessary in the future for your orator to increase its real estate, plant, property and construction in the same way as it has in the past; and, upon the value of such increased investment, including the value of the entire property, both tangible and intangible, employed in its business, your orator will be entitled to receive a fair and reasonable return.

16 XV. That by Chapter 737 of the Laws of 1905, hereinbefore referred to, it is provided that stocks or bonds shall not be issued by any gas corporation until the Commission of Gas and Electricity shall certify, in writing, as to the amount of stock or bonds reasonably required for the purposes of the corporation. Your orator is informed and believes, that the said Commission will not permit the issue of stock or bonds by your orator or by any gas company in the State of New York, unless, at the time of such proposed issue, the fair cash value of the plant of such gas company is at least equal to its outstanding stock and bonds; and for this reason, as well as for the business reasons hereinbefore set forth, your orator and all other gas companies in the State of New York will be obliged either to charge enough for gas to enable them to pay for all such additions, extensions and improvements out of their current earnings, or else to meet such expenses by the issue of new stock or bonds; and in order to obtain the right to make such new issue of stock or bonds, your orator and every other gas company in the State of New York must charge enough for gas to cover the cost of manufacture and distribution, and, in addition thereto, a sufficient sum for depreciation in order to prevent the cash value of its plant from falling below the amount of its outstanding stock and bonds. For these reasons, your orator and all other gas companies in the State of New York, if they desire to continue in the said business, will be compelled by law to charge a price for their gas at least sufficient to cover the reasonable cost of manufacturing and distributing gas, and to prevent the depreciation of their plants below the amount of their outstanding stock and bonds; and they will be compelled, by ordinary business prudence, to charge a price for gas sufficient to manufacture and distribute gas and to prevent the depreciation of their plants below the fair cash value thereof, irrespective of any profits on their capital or property.

17 XVI. That, under and by virtue of the Constitution of the United States and particularly of the Fourteenth Amendment thereto, your orator is entitled to charge a price for its gas, sufficient to cover the reasonable cost of manufacturing and distributing the

same with an allowance sufficient to prevent the depreciation of your orator's plant from any of the causes above set forth, and also a reasonable profit on the fair value of the property owned and used by it in its said business; and any law passed by the Legislature of the State of New York, and any order made by any Officer or Commission acting under the authority of the said Legislature, fixing a price for your orator's gas at any figure, which will not permit your orator to recoup the reasonable cost of the manufacture and distribution thereof, with a reasonable allowance for depreciation, as aforesaid, and a reasonable profit on the fair value of the property, both tangible and intangible, owned and used by your orator in its said business, takes your orator's property without just compensation, deprives your orator of its property without due process of law, and denies to your orator the equal protection of the laws, and is in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States; and the aforesaid Acts of the Legislature of the State of New York and the aforesaid order of the said Commission of Gas and Electricity are, for the foregoing reasons, in violation of the said provisions of the Fourteenth Amendment to the Constitution of the United States.

XVII. That by Chapter 712 of the Laws of 1899, the Tax Law of the State of New York was amended so as to render taxable, as real estate, all mains or pipes, laid or placed in or under any public or private street or place for conducting gas, including the value of all franchises, rights, authority or permission to construct, maintain or operate the same in or under any streets, highways or public places. It was provided by the said Act, that a franchise,
18 right, authority or permission therein specified, should, for the purpose of taxation, be known as a Special Franchise, and should be deemed to include the value of the tangible property of the corporation, situated in or under any street, highway, public place or public waters, and that the tangible property so included should be taxed as a part of the Special Franchise. The said Act created a State Board of Tax Commissioners to determine the valuation of such Special Franchises subject to assessment in each City, Town or Tax District. The value of your orator's Special Franchise, as fixed by the said State Board of Tax Commissioners for the year 1906, is the sum of $31,900,000. The actual cost to your orator of the mains and pipes in and under the public streets, which are included in the said assessment, was not less than the sum of $7,852,151.03, and the present value thereof is not less than that sum. Accordingly the value of your orator's franchise rights, as fixed by the State Board of Tax Commissioners for the year 1906, is in excess of $24,000,000; and your orator will be compelled to pay taxes upon such sum in the same way and at the same rate as it is taxed for its real estate. Notwithstanding this fact, the said Commission of Gas and Electricity, in their said order fixing the maximum price to be charged by your orator for gas, did not take into consideration at all, as a part of your orator's property and investment, upon which it is entitled to receive a reasonable profit, the value of its franchise rights. That this is the case appears from

the memorandum or opinion of the said Commission, which was filed with their order, and a copy of which is hereto annexed, marked "Exhibit E."

XVIII. That the actual and reasonable cost to your orator of manufacturing and distributing gas during the four years prior to 1905, exclusive of any allowance for repairs or for a fair annual return upon the intangible property employed by your orator in its business, including your orator's franchise rights, as aforesaid, but
19 adding thereto an allowance of 3 cents per thousand cubic feet of gas for contingencies, and of 2.62 cents per thousand cubic feet for increased illuminating power, now required by law, averaged about 67 cents per thousand cubic feet. The estimated reasonable cost to your orator, to be allowed for manufacturing and distributing gas during the year 1906, will be in excess of 70 cents per thousand cubic feet, such increase being due to the actual and reasonable cost to your orator of the coal, naphtha, pipe and other materials necessary for the manufacturing and distribution of your orator's gas, the cost of which has increased, owing to the increase of the amount of taxes which must be paid by your orator, and to the increase in the standard of illuminating power required by law. The said cost in 1906 of 70 cents per thousand cubic feet includes a reasonable allowance for depreciation and contingencies, based upon the experience of your orator and other gas companies in the City of New York. The said contingencies represent three cents per thousand cubic feet.

XIX. That as hereinbefore stated, the reasonable value of the plant and investment of your orator, employed in the manufacture and distribution of gas, is nearly $62,000,000, and the reasonable value of its franchise rights as fixed by the State Board of Tax Commissioners, as hereinbefore stated, exceeds $24,000,000, and the aggregate value of your orator's said property, employed in its said business, is, accordingly, about $86,000,000. In addition to its said franchise rights, your orator is possessed of a large amount of intangible property, which constitutes an integral and important part of its said business. Such property consists of the value of the connections between the pipes and mains of your orator and the various buildings throughout the City of New York, the value of various contracts owned by your orator in connection with its business, the value of the organization of your orator's business and good will, and various other elements of value which have been created and developed by your orator and its predecessors
20 through intelligent and efficient business management during the past three-quarters of a century and fidelity to their engagements, all of which possess the full attributes of property and materially add to the gross earnings of your orator, upon which it pays an annual tax of one per cent. to the State of New York. By reason of such good will, it would be difficult, if not impossible, for any company in the City of New York, even if vested with similar franchises to those possessed by your orator, to compete in selling gas to consumers in the said City; and if your orator elected to sell its tangible property and franchises, it could, apart from these,

obtain a large sum for the said good will. And your orator avers that upon this good will, as an element of substantive value, it is entitled to a reasonable return, and that, in fixing the price, at which your orator should sell its gas, as hereinbefore stated, the said Commission of Gas and Electricity allowed no return whatever upon the value of the said good will but wholly eliminated it as an item of substantive value. The said intangible property possesses very great value, as your orator is informed and verily believes. The reasonable profit upon the said investments, to which your orator is entitled and the enjoyment of which is guaranteed to it, as hereinbefore stated, by the Fourteenth Amendment to the Constitution of the United States, is at least ten per cent. per annum, in view of the care and skill required to be exercised in the management of its said business, its location and the hazard and risk necessarily involved in the conduct of the said business. The care required and the hazard and risks of the business and the cost of conducting it are constantly and inevitably increasing, owing to the substitution of asphalt paving for cobble stones, the rapid and extensive use of electricity for traction, power and lighting purposes (which may cause electrolysis and disintegration of the gas mains and conductors of your orator), and the construction of tunnels and subways, which greatly increase the danger of explosions and injuries to persons and property and add largely to the expense
21 of supervision. The amount of profits, to which your orator is entitled, in accordingly in excess of $8,500,000 per year. The total sales of gas made by your orator during the year ending October 31, 1905, was about 13,300,000,000 cubic feet. In order to earn the said profit of $8,500,000 a year upon your orator's said actual investment, it will be necessary, accordingly, for your orator to receive the sum of about 64 cents per thousand cubic feet in addition to the actual reasonable cost of manufacturing and distributing gas, for which there should be allowed, as hereinbefore stated, during the year 1906, a sum in excess of 70 cents per thousand cubic feet. Taking all the circumstances of the case and the interests of both the Company and of the inhabitants of the City and County of New York as well as of the defendant, the City of New York, into account, a fair, just and reasonable price for gas in the said City, at the date of the said order of February 23, 1906, and at the present time, could not possibly be less than $1 per thousand cubic feet. The said rate of eighty cents per thousand cubic feet, fixed by the said Commission, as aforesaid, will permit a profit of only ten cents per thousand cubic feet to your orator, as aforesaid; and should the sales of your orator's gas continue at the rate of $13,300,000,000 cubic feet per year, as during the year ending October 31, 1905, as aforesaid, your orator's total annual profits will not exceed the sum of $1,330,000, or less than 1½% of profit on your orator's actual investment of $86,000,000, in its said business, as aforesaid.

XX. That the price of 30 cents per thousand cubic feet, fixed by the said Commission by the order aforesaid, was not, in fact, based upon the reasonable cost to your orator of manufacturing and

distributing gas in the said City and County, and does not bear any relation to such reasonable cost or to the amount reasonably necessary to be allowed for depreciation, as aforesaid, or to the amount required to furnish a reasonable return to your orator upon
22 its capital stock or upon the fair value of the property owned and used by it in its said business, and is and would be an unreasonable and confiscatory rate of compensation for the gas supplied and the service rendered by your orator.

XXI. That the opinion or statement, rendered by the said Commission in connection with its said order, a copy of which is hereto annexed, marked "Exhibit E," stated that the said Commission had determined that the reasonable value of the property, actually employed by your orator in the manufacture and distribution of gas on October 31, 1905, did not exceed the sum of $30,000,000; whereas, as hereinbefore stated, the reasonable value of such property is in excess of the sum of $86,000,000, as hereinbefore specified. Furthermore, as appears from the said statement, the said Commission deducted the sum of $2,665,000 as the value of a plant formerly used by your orator for the manufacture and distribution of gas, which has been taken by the City of New York in condemnation proceedings, in which an award has not yet been made by the Commission, and will probably not be made for some time to come. The said value of $2,665,000 was stated to be the value placed upon the property by witnesses for your orator, whereas witnesses called on behalf of the City have testified that the value of such property is not in excess of $1,089,197.73. The award of the Commissioners in the said proceeding may be less than the value claimed by the witnesses who testified on behalf of your orator. It furthermore appears from the said statement that the said Commission considered eight per cent. a reasonable percentage of profit upon the actual value of the property owned by your orator and used in the manufacture and distribution of gas, whereas such percentage is unreasonably low; and if your orator is limited to such return, it will be deprived of its property without due process of law, in violation of the Constitution of the United States. It furthermore appears from the said statement, that the Com-
23 missioners do not consider that your orator was entitled to earn any return upon the value of its franchise rights, notwithstanding the fact that your orator is taxed upon the said franchise rights upon a valuation in excess of $24,000,000. It furthermore appears from the said statement, that the said Commission did not allow anything for the expenditures, which have been made by your orator at Astoria for the construction of the additional plant as hereinbefore stated, erroneously concluding that the prospective economies in the cost of manufacture and the increase in the sale of gas by reason of the reduction in price, would enable your orator to pay a reasonable return on any necessary investment in Astoria; whereas, in the opinion of your orator and of persons familiar with the gas business in New York City, it is purely conjectural whether there will be any substantial increase in the sale of gas by reason of the said reduction in price; and any possible economies in the

cost of production at Astoria will largely be offset by the increased cost of distribution, owing to the necessity of distributing the gas through a tunnel under the East River. The price fixed in the said order of February 23, 1906, is not a just, fair or reasonable compensation for the use of your orator's property, or a just, fair or reasonable return for the services rendered by your orator; and the effect of the said order of February 23, 1906, will be to reduce the gross income of your orator below the actual and reasonable cost of manufacturing and distributing gas (including an allowance for depreciation of its plant and a fair profit upon its capital stock or upon the property owned and used by it in its said business) to prevent your orator from fulfilling the purposes of its incorporation and from performing the duties, imposed upon it by the common law and by the statutes of this State, hereinbefore referred to, and to compel your orator either to continue in said business without the fair profit, to which it is entitled, or to abandon its business altogether and to sacrifice its said plants for a small fraction of their cost and present value.

24 XXII. That Chapter 736 of the Laws of 1905, hereinbefore referred to, which fixes the price of gas supplied to the City of New York at 75 cents per thousand cubic feet and attempts to regulate the pressure thereof, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives your orator of its property without due process of law and denies to your orator the equal protection of the laws and offers special privileges to one of your orator's consumers which it does not offer to any other of said consumers. Chapter 125 of the Laws of 1906, which fixes the price of gas furnished by your orator to private consumers in the City and County of New York at the rate of 80 cents per thousand cubic feet and which, by its terms, does not apply to the municipality of New York, and attempts to regulate the pressure of gas, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, for the same reasons. The order of the said Commission of Gas and Electricity of February 23, 1906, prescribing a maximum price of eighty cents per thousand cubic feet to all consumers, will, if enforced, deprive your orator of its property, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, inasmuch as the action of the said Commission, in making the said order, is without authority of law and wholly void, by reason of the fact that it is in direct violation of the said Chapter 736 of the Laws of 1905, which prescribed a maximum price of 75 cents per thousand cubic feet for gas supplied to the defendant, the City of New York; and the action of the said Commission in making the said order is also void, by reason of the fact that Chapter 737 of the Laws of 1905, creating the State Commission of Gas and Electricity, is unconstitutional and void and confers no authority upon the said Commission, as it is in violation of the Constitution of the State of New York, which provides that the legislative power of the State

25 shall be vested exclusively in the Senate and Assembly; whereas, by the said Act, the Legislature of the State of New

York, in disregard of the said constitutional provision, attempted to delegate to the said Commission of Gas and Electricity the absolute, unqualified and discretionary legislative power to fix the maximum price, to be charged for gas in all communities throughout the State, without prescribing any rule or method in accordance with which such rate should be fixed; and the said Chapter 737 of the Laws of 1905 is void upon the further ground that it purports to confer upon the Appellate Division of the Supreme Court for the Department, in which the property of any company affected by any such order of the said Commission is situated, upon an appeal thereto from such order, the legislative power to fix a new rate, instead of the rate so fixed by the said Commission, in violation of the provision of the Constitution of the State of New York that the legislative power of the said State shall be vested exclusively in the Senate and Assembly.

All of the said Acts and the said order are unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, because they deprive your orator of its property without due process of law and take its property for public and private use without just compensation and deprive your orator of the equal protection of the laws.

XXIII. That it is an absolute physical impossibility for your orator to comply with the provisions in the said statutes and order in regard to pressure. The pressure must, of necessity, vary beyond the limits prescribed thereby in the mains of your orator, owing to differences of elevation of the said mains and the consequent difference of atmospheric pressure; and, owing to the laws of nature, these differences of pressure cannot be obviated by your orator. The defendant, the City of New York, has brought actions against your orator to recover the penalties prescribed by Chapter 736 of
26 the Laws of 1905, for violations of said provision in regard to pressure, and the amount which it claims to recover in the said actions already aggregates the sum of $46,000; and your orator is informed and believes that it intends to bring further actions against it, from time to time, to recover additional penalties for such violation.

Your orator now has upwards of 390,000 customers in the City and County of New York, in addition to the said municipality of New York, to whom it is daily selling and distributing gas. The amount of gas so sold and distributed during the year ending October 31, 1905, as hereinbefore stated, exceeded 13,000,000,000 cubic feet. A large proportion of your orator's said customers are people of small means, who are financially irresponsible; and many of them are only temporary residents of the City of New York. Your orator renders to each of its customers monthly statements for gas consumed by them during the preceding month, and collects therefor within a short time thereafter. Unless such bills are promptly paid, it discontinues the supply of gas to such customers, pursuant to the provisions of Section 68 of the Transportation Corporations Law; and that is the only method by which your orator is enabled to avoid great loss resulting from the failure or the inability of such custom-

ers to pay the bills for the gas consumed by them. If the rate of 80 cents per thousand cubic feet, fixed by the said order and by the said statute, should be enforced as hereinbefore stated, and if your orator should make a charge to any consumer in excess of the rate fixed by the order of the said Commission, it is provided by Chapter 737 of the Laws of 1905, that the fact of such charge in excess of 80 cents per thousand cubic feet shall be a complete defense to your orator's entire claim against such consumer. Furthermore, as hereinbefore stated, it is provided by Chapter 125 of the Laws of 1906, that any corporation, violating any provision of the said Act shall forfeit the sum of one thousand dollars for *each* offense to the
27 people of the State. Your orator is advised and believes that this provision may be construed to impose a penalty of one thousand dollars for every charge made by your orator to its customers in excess of 80 cents per thousand cubic feet. Your orator is informed and believes that the defendant Mayer, the Attorney General of the State of New York and the defendant Jerome, the District Attorney of New York County, intend to institute suits for the recovery of such penalties, pursuant to the requirements of Section 1962 of the Code of Civil Procedure of the State of New York, which provides that where a penalty has been incurred to the People of the State, the Attorney-General, or the District Attorney of the County in which the action is triable, must bring an action to recover the penalty. Furthermore, your orator is informed and believes that the defendants Gunnison, Davies and Shedden, Commissioners, and the defendant, the City of New York, and various persons, interested in the matter by virtue of being consumers of your orator's product, intend to institute mandamus proceedings to compel the enforcement of the 80 cent rate fixed by said the Commission, pursuant to the provisions of Section 20 of Chapter 737 of the Laws of 1905, hereinbefore referred to.

XXIV. That if the said 80 cent rate should be enforced, or if the defendant Mayer, the Attorney General, or the defendant Jerome, the District Attorney, should begin prosecutions against your orator for failure to comply with the 80 cent rate, a large number of consumers would decline to pay the price fixed by your orator, as aforesaid, and would refuse to pay any part of your orator's claim for gas furnished to them, upon the pretext that the fact of your orator's having made a charge in excess of the 80 cent rate constitutes a complete defense to your orator's claim against them. If your orator should attempt to remove the meters in the houses of such consumers, or should attempt to discontinue the supply of gas to them, it would immediately be subjected to a multiplicity of pro-
28 ceedings to compel it to restore the meters and supply gas to such consumers; and if your orator should permit the bills of such consumers to run until the final determination of such suit or suits or proceedings as might be brought to compel the enforcement of the said rate or to enforce the penalties for failure to comply with the 80 cent rate as fixed, the outstanding bills due and payable to your orator would aggregate several million dollars, the exact amount of which your orator is, at present, unable to calculate.

By reason of the financial irresponsibility of a large number of such consumers, your orator, if it should finally succeed in defeating the said suits and prosecutions, would be unable to collect from such customers the amount of such outstanding indebtedness; and thereby your orator would suffer enormous loss, the exact amount of which your orator is unable to calculate, and which it is impossible to calculate, but which would amount to an enormous sum. If it should be held that every charge in excess of the 80 cent rate is a violation of the provisions of Chapter 125 of the Laws of 1906, for which a forfeiture of one thousand dollars should be imposed, and your orator should make such a charge in excess of the 80 cent rate each month to each of its consumers, numbering, as hereinbefore stated, over 390,000 the aggregate of the penalties so incurred during one year would amount to over $4,680,000,000 and would be over fifty-four times as great as the value of all the tangible assets and franchises belonging to your orator, and employed by it in its said business, as aforesaid, and would exceed in amount the entire assessed valuation of all the real estate situated in the Boroughs of Manhattan and The Bronx; and the damage to your orator would be irreparable and absolutely destructive of all its assets, franchises, and property, in violation of the Fourteenth Amendment to the Constitution of the United States, insuring to your orator the equal protection of the laws.

XXV. That the necessary operation of the said order and statutes would be to reduce the amount of the gross receipts of your
29 orator one-fifth of the present amount, and its net profits more than two-thirds; and your orator would thereby suffer irretrievable loss for each day's enforcement of such rate, amounting to nearly $7,300 per day in loss of revenue due to the decreased rate alone, not considering any penalties imposed by the said statutes. The penalties imposed by the said statutes were intended and calculated to coerce your orator and its officers to acquiesce therein; and a refusal and failure to observe and comply with the said 80 cent rate, if only for the purpose of having the question tested in good faith in a court of law, would involve a risk of absolute ruin to your orator, in that your orator has over $390,000 customers in the City of New York, as aforesaid, and that the said Act of 1906 may be held to impose a penalty of one thousand dollars for every monthly charge to each customer in excess of 80 cents per thousand cubic feet. In other words, the possible penalties under the said Act, in case each such charge in excess of the rate fixed thereby should be held to be a violation of the Act, would amount to $390,000,000 per month. The defendants Mayer, Attorney General and Jerome, District Attorney, have no discretion in the matter, but the absolute duty is imposed upon them by Section 1962 of the Code of Civil Proceedure, hereinbefore referred to, to institute suits for the recovery of the said penalties. Your orator is advised by counsel, and, therefore, avers and claims, that there is no remedy, except in equity, to test adequately and completely the said Acts and order, and that, in the absence of such remedy in equity, the penalties, provided in the said Acts and order would be unreasonable and confiscatory, and

would deprive your orator of its liberty of contract and of its property without due process of law and without just compensation and would likewise deny to it the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States; on which account your orator invokes the jurisdiction of this Court, to protect it against the aforesaid threatened
30 . invasion by the defendants of its inherent rights under and guaranteed by the Constitution of the United States.

XXVI. That the business of your orator which will be impaired by the threatened acts of the defendants, as hereinbefore stated, is of very great value, to wit, of the value of more than $5,000,000 a year; and the amount involved in this suit is more than $2,000.

XXVII. That, if a temporary injunction shall be granted herein, restraining the enforcement of the rate prescribed by the said statutes and order, during the pendency of this action, your orator is willing and hereby offers, to pay into this Court all sums which shall be received by it in excess of the rate so fixed, to await the determination of this action; and in case the validity of said rate shall finally be sustained herein, the amount so paid into court shall be returned to the persons from whom the same was received.

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the defendants may each answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, it now prays:

1. That it be adjudged and decreed that Chapters 736 and 737 of the Laws of 1905 and Chapter 125 of the Laws of 1906 and the order of the Commission of Gas and Electricity of the State of New York, of February 23, 1906, are illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States, as aforesaid, and of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contract rights of your orator, hereinbefore referred to.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which would result from
31 the threatened enforcement of the said Acts and order and that such injury would be irreparable.

3. That it be adjudged and decreed that your orator be granted writs, both temporary and permanent, of injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them, and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of the said Acts and order, from in any way, enforcing or attempting to enforce the said Acts and order, or any of the provisions thereof, against your orator, and that under and by virtue of the provisions of section 718 of the Revised Statutes, a restraining order may be granted against the defendants and each of them, their officers, agents, servants and employees, restraining them, as herein stated, until your honorable Court shall determine, upon motion and hearing, whether a temporary injunction, with like effect, shall not be granted *pendente lite*.

4. Your orator further prays that if, at any time hereafter and

prior to the final hearing hereof, any consumers of gas or other customer of your orator, or any other person, association or corporation in the City of New York shall attempt to enforce the provisions of the said Acts and order or otherwise act or proceed thereunder, such persons, or some of them on behalf of all, be made parties defendant hereto and each of them be enjoined and restrained as heretofore prayed; and that your orator have such other and further or different relief as to the Court may seem meet and the nature of the case may require.

5. Your orator further prays that your Honors grant unto your orator a writ of *subpœna ad respondendum*, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them, on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct
32 and perfect answer make to all and singular the premises and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet; and also that a writ of provisional injunction to the same purport, tenor and effect, as hereinbefore set forth and appears, be granted during the pendency of this action.

And your orator will ever pray, etc.

CONSOLIDATED GAS COMPANY
OF NEW YORK,
By WALTER R. ADDICKS,
Vice-President.

SHEARMAN & STERLING,
Solicitors for Complainant, 44 Wall Street, New York City.

JOHN A. GARVER,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York:

Walter R. Addicks, being duly sworn, says that he is the Vice-President of the Consolidated Gas Company of New York, the complainant named in the foregoing bill of complaint and who has subscribed to the same; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

WALTER R. ADDICKS.

Sworn to before me, May 1, 1906.

[SEAL.] CORNELIUS A. LOUGHLIN,
Notary Public, New York Co.

33 EXHIBIT A.

CHAP. 736.

An Act in relation to the price of illuminating gas furnished or sold to the city of New York and providing a penalty for violation.

Accepted by the city.

Became a law, June 3, 1905, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. A corporation, association, copartnership or person engaged in the business of furnishing or selling illuminating gas in the city of New York, shall not charge said city or receive therefrom for such gas, a sum in excess of seventy-five cents per one thousand cubic feet.

§ 2. The illuminating gas furnished or sold by any such corporation, association, copartnership or person to said city shall have an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of said illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches.

§ 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name of and by the city of New York for its benefit.

34 § 4. All acts or parts of acts inconsistent herewith are hereby repealed.

§ 5. This act shall take effect on the first day of July, nineteen hundred and five.

EXHIBIT B.

CHAP. 737.

An Act to establish a commission of gas and electricity with power to regulate the price of gas and electric light and certain other electric services, and to provide for the control and supervision of gas, electric light and other electric corporations and making an appropriation therefor.

Became a law, June 3, 1905, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. *Commission of gas and electricity established.*—The commission of gas and electricity is hereby established and shall possess the powers and perform the duties hereinafter specified.

§ 2. *Definitions; applications of act.*—The word "commission" when used in this act means the commission of gas and electricity. The word "corporation" includes a company, association and joint-stock association. The word "municipality" includes a city, village, town or lighting district organized as provided by a general or special act. The word "person" includes an individual, firm or copartnership. This act shall not apply to railroad, telegraph or telephone corporations.

§ 3. *Appointment; terms of office; vacancies.*—The commission of gas and electricity shall consist of three commissioners to be appointed by the governor, by and with the advice and consent of the senate, one of whom shall be designated by the governor as chairman. Of the commissioners first appointed hereunder, one shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, from the first day of June, nineteen hundred and five. Upon the expiration of such terms, the term of office of commissioners thereafter appointed shall be six years beginning on the first day of June in the year in which they are appointed. Each commissioner appointed hereunder shall hold office until his successor shall have been appointed, and shall have qualified. If a vacancy shall occur in any such office, otherwise than by expiration of term, the governor shall appoint a commissioner to fill such vacancy for the unexpired term.

§ 4. *Oath of office; eligibility of commissioners and officers of commission.*—Each commissioner and each person appointed to office by the commission shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. No person shall be eligible to appointment or shall hold the office of commissioner, or be appointed by the commission to, or hold any office or position under the commission, who holds any official relation to any gas or electric light or power corporation, or who owns stock or bonds therein.

§ 5. *Officers and meetings of commission; official seal; stationery.*—The principal office of the commission shall be in the city of Al-

bany, in rooms designated by the trustees of public buildings, and it may have a branch office in the city of New York, and one in the city of Buffalo. The commission shall meet at least once a month during the year at its office in Albany. The commission shall have an official seal, to be prepared by the secretary of state as provided by law, and its offices shall be supplied with necessary postage, stationery, office furniture and appliances, to be paid for as other expenses authorized by this act, and it shall have prepared for
36 it by the state the necessary books, maps and statistics, incidentally necessary for the discharge of its duties.

§ 6. *Quorum of commission; powers of single commissioner.*—Two of the commissioners shall constitute a quorum for the transaction of any business or the performance of any duty of the commission and may hold meetings thereof at any time or place within the state. All examinations or investigations made by the commission may be held and taken by and before any one of the commissioners, and the proceedings and decisions of such single commissioner, shall be deemed to be the proceedings and decisions of the commission, when approved and confirmed by it.

§ 7. *Officers, clerks, inspectors and employees.*—The commission may appoint such officers, clerks, inspectors, experts and employees as may be required to carry out the provisions of this act, subject to the provisions of the civil service law, and may prescribe their duties.

§ 8. *Salaries and expenses.*—The annual salary of each commissioner shall be eight thousand dollars. The officers, clerks, inspectors, experts and other employees of the commission shall receive the compensation fixed by the commission. In the discharge of their official duties the commissioners shall have reimbursed to them the necessary traveling expenses and disbursements of themselves, their officers, clerks, inspectors, experts and other employees, not exceeding in the aggregate the sum of five hundred dollars per month. All salaries and disbursements shall be audited and allowed by the comptroller and paid monthly by the state treasurer upon the warrant of the comptroller.

§ 9. *General powers of commission.*—Such commission shall:

1. Have the general supervision of all persons and corporations having authority under any general or special law to lay down or erect and maintain wires, pipes, and other fixtures in, over or under the streets, highways and public places of any municipality
37 in this state, for the purpose of furnishing gas or of furnishing or transmitting electricity for light, heat or power.

2. Investigate and ascertain, from time to time, the quality of gas supplied by persons, corporations or municipalities; examine the methods employed by such persons, corporations or municipalities in supplying gas and electricity for light, heat and power or in transmitting the same, and order such improvements as will best promote public interests, preserve the public health and protect those using such gas or electricity, and those employed in the manufacture and distribution thereof, or in the maintenance or operation of the works, wires, poles, lines and systems connected therewith.

3. Fix the standard of illuminating power and purity of gas

manufactured and sold by persons, corporations and municipalities for lighting purposes, not less than that prescribed by law, and require the gas so manufactured and sold to equal the standard established by law or by it, and establish a standard of pressure at which gas shall be delivered, where such standard is not otherwise prescribed by law.

4. Have power, in its discretion, to prescribe methods of keeping accounts and books, to be observed by the persons, corporations and municipalities engaged in the manufacture, sale and distribution of gas and electricity for light, heat or power.

5. Examine all persons, corporations and municipalities under its supervision, keep informed as to the methods employed by them in the transaction of their business, and see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters.

6. Require each corporation under its supervision to submit to it an annual report, verified by the oath of the president, treasurer or general manager thereof, showing in detail (1) the amount of its authorized capital stock, the amount issued and outstanding; (2) the amount of its authorized bonded indebtedness and the
38 amount of its bonds issued and outstanding; (3) its receipts and expenditures during the preceding year; (4) the amount paid as dividends upon its stock and as interest upon its bonds; (5) the amount paid as salaries to its officers and as wages to its employees; (6) the location of its plant and system, with a full description of its property and franchises; and (7) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such corporation as may be required by the commission. Such reports shall be in the form, cover the period, and be submitted at the time prescribed by the commission.

7. Make to the legislature an annual report containing the result (1) of examinations or investigations conducted by it, abstracts of reports of corporations made to it, (2) recommendations as to modifications of the laws pertaining to the affairs of corporations subject to its supervision, (3) such facts and explanations as will disclose the methods employed in the manufacture, sale and distribution of gas and electricity for light, heat and power, (4) suggestions as to the better protection of public interests and health in the transaction of business by such corporations, and (5) a record of the meetings and an abstract of the proceedings of the commission during the preceding year.

8. Have power, either through its members or inspectors or employees duly authorized by it, to enter in or upon the property, buildings, plants, factories, power houses and offices of any of such corporations, persons or municipalities while the same are open for the purpose of operation or while the business of such corporation is being done therein.

9. Have power to examine the books and affairs of any such corporations, persons or municipalities, and to compel the production

before it of books and papers pertaining to the affairs being investigated by it.

10. Have power to subpœna witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it under the provisions of this act.

39 11. Have power to adopt rules governing practice in proceedings brought by or before it not inconsistent with law.

§ 10. *Inspection of gas and electric meters.*—Such commission shall have full power, control and supervision of the inspection of gas and electric meters by any state or municipal officer appointed for such purpose, and may adopt and enforce rules and regulations, not inconsistent with law, prescribing the manner, methods and conditions of testing such meters. It shall see that the state inspector of gas meters, and the inspectors appointed by him, and municipal inspectors of gas and electric meters, faithfully perform the duties imposed upon them by law, and by the rules and regulations of the commission, and shall report any failure of such performance or any violation of law or of such rules and regulations to the officer or board appointing such inspectors, and such failure or violation shall be a sufficient cause for their removal. The commission may provide for the inspection of electric meters, and may appoint an inspector for such purpose who shall perform the duties required of him by the commission.

§ 11. *Approval of incorporation and franchises; certificate.*—A corporation hereafter incorporated under the laws of this or any other state for manufacturing and supplying gas for lighting the streets, highways and public places, and for heating and lighting public or private buildings, or for manufacturing, using, transmitting and supplying electricity for producing light, heat or power for public or private buildings or for lighting streets, highways and public places, shall not exercise any of its powers, or transact any business within this state, until it shall have secured a certificate of authority therefor signed and executed by the commission under its official seal. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the

40 required consent of the proper municipal authorities. The commission may inquire as to the necessity of the service to be furnished by such corporation, and as to the intentions and good faith of the corporation and its officers, and if satisfied that the territory within which such corporation proposes to operate is already supplied by an ample and well constructed system, furnishing the service which such corporation proposes to furnish, at a fair and reasonable rate, such commission may refuse to grant its certificate of authority. No municipality shall build, maintain and operate for other than municipal purposes any works or systems for the manufacture and supplying of gas or electricity for lighting purposes without a certificate of authority granted by the commission. If the certificate of authority is refused, no further proceedings shall be

taken before the commission, but a new application may be made therefor after one year from the date of such refusal.

§ 12. *Approval of issue of stock and bonds.*—Stock or bonds shall not be issued by any corporation hereafter incorporated which is subject to the supervision of the commission, until the certificate of authority has been issued as required in the preceding section, and until such commission shall further certify, in writing as to the amount of stock or bonds reasonably required for the purposes of the corporation. Stock and bonds of such corporation shall not be issued in excess of the amount so certified. Any such corporation heretofore or hereafter incorporated shall not increase its capital stock or its bonded indebtedness without the consent in writing of such commission, stating the amount of the authorized increase. For the purpose of making its determination as to the amount of stock and bonds to be issued or the amount of the authorized increase of the capital stock and bonded indebtedness of any such corporation, the commission may take and hear testimony, and examine the books and papers of the corporation, and require verified statements from the officers thereof, pertaining to the value of the property and franchises owned and operated by such corporation. Such
41 determination shall be made within thirty days after the final submission of the papers or a final hearing on the application.

§ 13. *Approval of transfer of franchise.*—A corporation subject to the general supervision of the commission shall not transfer or lease its franchise, works, system or property or any part of such franchise, works, system or property to any other person or corporation or contract for the operation of its works, system and property without the written consent of the commission. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality, unless authorized so to do by the commission.

§ 14. *Appeals to appellate division.*—If the commission shall refuse any certificate, authority or consent required under the provisions of either of the three preceding sections, the commission shall, if requested by the applicant for such certificate, authority or consent, furnish a certified copy of all papers before it pertaining to the application, and of its findings thereon, and such applicant may, within sixty days after notice of such refusal, present such papers and findings for review to the appellate division of the supreme court of the third department, and such appellate division may order the commission to issue the certificate or grant the authority or consent applied for. Upon such review the commission shall be represented by the attorney general.

§ 15. *Complaints as to quality and price of gas and electricity.*—Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less

than one hundred customers, or purchasers of such gas or electricity, either as to illuminating power, purity, pressure or
42 price of such gas or electricity sold and delivered in such municipality, the commission shall investigate as to cause for such complaint, and may, by its agents and inspectors, inspect the works. system, plant and methods used by such person or corporation in manufacturing, transmitting and supplying such gas or electricity and examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity.

§ 16. *Forms of complaints; signatures.*—The form and contents of complaints made as provided in the preceding section shall be prescribed by the commission. Such complaints shall be signed by the officers or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

§ 17. *Notice and hearing; fixing price of gas or electricity; orders requiring improvement.*—Before proceeding under a complaint presented as provided in section fifteen, the commission shall cause notice of complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. A public hearing shall be had upon such complaint at which the complainants and the person or corporation complained of shall have an opportunity to be heard, and may be represented by counsel. After such hearing and upon such investigation as may have been made by the commission or its officers, agents or inspectors, the commission, within the limits prescribed by law, may fix the maximum price of gas or electricity which shall be charged by such corporation or person in such municipality, or may order such improvement in the manufacture or supply of such gas or in the manufacture, transmission or supply of such electricity, or in the methods employed by such person or corporation, as will in its judgment improve the service. The price so fixed by the commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years and until, after the expira-
43 tion of such term such commission shall upon complaint as provided in this section again fix the price of such gas or electricity.

§ 18. All orders made by the commission upon its own motion or without complaint, as above provided, shall be made after reasonable notice to the person or corporation affected thereby, and after reasonable opportunity to such person or corporation to present his, their or its defence or objections to the demands of the commission.

§ 19. The complainant, or any person or corporation aggrieved by any order made by the commission whether upon complaint or otherwise, may, within thirty days after notice of the making of such order, appeal to the appellate division of the supreme court of any department within which the property of the person or corporation affected by said order is situated, except as otherwise hereinbefore provided, in whole or in part. Such court may affirm, reverse in whole or in part or modify the order appealed from, or may make such

order in the premises in its discretion as it may deem just and proper. On all such appeals the commission shall be represented by the attorney-general.

§ 20. An order made by the commission, as in this act provided, or in case of an appeal from an order, the order as affirmed or modified or the order made on such appeal may be enforced by writ of mandamus. The commission or any person, corporation or municipality interested in the enforcement of such order may apply to the supreme court at a special term thereof for a writ of mandamus to compel compliance with such order, upon proof that the said order has been duly made, as in this act provided, and has not been complied with, after notice of the making thereof, to the person or corporation affected thereby, the supreme court may issue a writ of mandamus to enforce the provisions of said order.

§ 21. *Defense in cases of excessive charges.*—If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been de-
44 manded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defence to such action.

§ 22. There shall be appropriated for the use of the commission and for the payment of salaries and disbursements under this act, from money not otherwise appropriated the sum of sixty thousand dollars.

§ 23. This act shall take effect immediately.

45 EXHIBIT C.

At a meeting of the Commission of Gas and Electricity of the State of New York, held at the Capitol in the City of Albany, N. Y., on the 23rd day of February, 1906.

Present: Frederic E. Gunnison, John C. Davies, Lucian L. Shedden, Commissioners.

In the Matter of the Complaint of EDWARD C. KEYS and Others, Being Upwards of One Hundred Customers of the CONSOLIDATED GAS COMPANY OF NEW YORK, and the Complaint of R. H. & M. McGURRIN and Others, also Being Upwards of One Hundred Customers of said Company.

Complaint in writing having been made and signed by Edward C. Keys and others, being upwards of one hundred customers and purchasers of gas sold and delivered by the Consolidated Gas Company of New York in the Borough of Manhattan, City and State of New York, as to the price of such gas so sold and delivered in said city, wherein the complainants pray that the maximum price which the said Company may charge for gas be fixed at seventy-five cents per thousand cubic feet; and the further complaint in writing
46 made and signed by R. H. & M. McGurrin and others, being upwards of one hundred customers and purchasers of gas sold

and delivered in said Borough of Manhattan, City of New York, by the said Consolidated Gas Company of New York as to the price of such gas so sold and delivered, wherein the complainants pray that an order may be made reducing the price charged for such gas to the extent warranted by the evidence; and public hearings having been had upon such complaints in said city of New York pursuant to a notice of said complaints, and the purposes thereof, which notice was duly served on said Consolidated Gas Company;

Page, Brant & Booth, by Alfred R. Page, Esq., appearing for the complainant first above mentioned;

Clarence J. Shearn, Esq., by William A. De Ford, Esq., appearing for the complainants last above mentioned;

Charles F. Mathewson, Esq., appearing in behalf of said Consolidated Gas Company;

And the said proceedings having been consolidated at said hearing by order of said Commission, and the said Commission having investigated as to the cause for such complaints and inspected the works, system, plants and methods used by said Consolidated Gas Company in manufacturing and distributing such gas, and having examined the books and papers of said Company pertaining thereto; and, pursuant to a further notice, duly served upon the said Consolidated Gas Company of New York, the Commission at said hearing having inquired into, examined and investigated the illuminating power, purity and pressure of gas supplied by said Company, and having examined the methods employed by it in the transaction of its business and inquired into the methods and means employed in manufacturing, distributing and supplying gas for light, heat and power; Now, after such hearings and upon such investigations and upon the evidence and argument of counsel, and due deliberation having been had, it is

Ordered, that on and after the first day of May, 1906, the
47 maximum price for gas which shall be charged by the Consolidated Gas Company of New York, in the Borough of Manhattan, City of New York, State of New York, be and is hereby fixed at eighty cents per thousand cubic feet; and, it is further

Ordered, that the gas furnished, sold and delivered by the Consolidated Gas Company of New York shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour, tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour, as is now provided by law; and, it is further

Ordered, that the gas furnished, sold and delivered by the Consolidated Gas Company of New York shall not contain in each one hundred cubic feet of such gas more than five grains of ammonia, nor more than twenty grains of sulphur, nor more than a trace of sulphurated hydrogen.

As the gas supplied to all customers of the Consolidated Gas Company is delivered through the same service mains as gas supplied to the City of New York, and as the pressure of gas so supplied is fixed by law at not less than one inch nor more than two and one-half inches in any service mains in said city, at any distance from

the place of manufacture, said law fixes the pressure of gas at which all customers and consumers of the Company must be furnished in said city.

FREDERIC E. GUNNISON,
JOHN C. DAVIES,
LUCIAN L. SHEDDEN,
Commission of Gas and Electricity of the State of New York.

48 EXHIBIT D.

CHAPTER 125.

An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Accepted by the City.
Became a Law April 3, 1906, with the approval of the Governor Passed, a majority being present.
The People of the State of New York, represented in Senate and Assembly, do enact as follows:
SECTION 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:
1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.
2. In the second and fourth wards of the borough of Queens and in the thirtieth ward of the borough of Brooklyn, one dollar.
3. In the third ward of the borough of Queens, in the thirty-first ward of the borough of Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten
49 cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.
4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year

nineteen hundred and nine; one dollar and five cents, during the year nineteen hundred and ten; and one dollar thereafter.

§ 2. The illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§ 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

§ 4. This act shall not apply to gas furnished or sold to the city of New York.

§ 5. Chapter three hundred and eighty-five of the laws of eighteen hundred and ninety-seven, entitled "An act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants," and all other acts or parts of acts inconsistent herewith are hereby repealed.

§ 6. This act shall take effect on the first day of May, nineteen hundred and six.

50 EXHIBIT E.

Memorandum or Opinion of Commission.

"The Commission of Gas and Electricity has this day filed an order fixing the maximum rate at which the Consolidated Gas Company of New York shall sell its gas to its consumers for three years from May 1st, 1906, at eighty cents per thousand cubic feet, such gas to be of 22 candle power, and of the purity and pressure now established by law.

"Orders have also been issued in the case of the other companies operating in the Borough of Manhattan against which complaints were filed, viz., the New Amsterdam, Standard and Mutual. The rate of eighty cents per thousand cubic feet has been fixed in the case of each of said companies.

"Orders will be issued forthwith in the cases of the Central Union and Northern Union companies, operating in the Borough of The Bronx.

"An investigation is now being held in the matter of the complaints against the Brooklyn Union Gas Company.

"The Consolidated Company is the largest company operating in New York and on October 31st, 1905, had issued and outstanding $80,000,000 capital stock, and bonds and convertible debentures amounting to $21,245,000. During the nominal year ending Oct.

31, 1905, it sold to consumers 13,037,164,550 cubic feet gas; street lamp use, 271,199,223 cubic feet gas; total, 13,308,363,773 cubic feet gas.

"The company received an income from consumers, $13,012,-206.09; street lamps, $559,823.11; total, $13,572,029.20.

"The cost of manufacturing and distributing the gas sold to consumers amounts to $7,920,077.46 or 60.75c. per thousand cubic feet, not including fixed charges of the company amounting to $936,-883.24. This cost per thousand cubic feet includes not only the actual repairs and replacements for the year ending Oct. 31,
51 1905, but an additional sum sufficient to bring the expenditures for repairs and replacements to the average expenditure by the company for twenty years for these items.

"Upon the hearing the Consolidated Gas Company produced its contracts for the purchase of oil, coal and other materials used in the manufacture of gas, and also its contracts for the sale of its residuals.

"On the first day of July, 1905, a law passed by the Legislature of 1905, went into effect, which compelled the Consolidated Gas Company to furnish gas of an illuminating power of twenty-two candles, which was an increase of two candle-power over that formerly prescribed by law.

"The nominal year ending Oct. 31, 1905, included four months only of operation under the higher candle-power requirement. As these months were during the warmer weather, when the cost of enrichment is least, the commission found that 1.81c. per thousand cubic feet should be added to the actual cost of gas as found for the nominal year to obtain the cost of manufacturing and distributing gas of twenty-two candle-power for twelve months.

"The value of the property of the Consolidated Gas Company actually employed in the manufacture and distribution of gas on Oct. 31, 1905, did not exceed the sum of $30,000,000.

"Evidence taken before the committee appointed by Senate by resolution adopted May 15, 1885, was introduced, showing the cost of the properties of the constituent companies, exclusive of franchises, as appeared on their books, to be in 1884, $20,942,632.88. The net additions for construction from 1884 to Oct. 31, 1905, amounted to $9,693,565.90. To this should be added value of materials on hand Oct. 31, 1905, $616,470.08, making a total of $31,-252,668.83.

"Recently property at Eighteenth street, formerly used as a coal gas manufacturing plant by the Consolidated Gas Company, was condemned by the city of New York, and while an award has not yet been made by the commissioners appointed to condemn
52 said property, title has passed to the city and the amount of the award, when made, will carry interest at the rate of 6 per cent. from the date the city took title. The value of the property so taken is not actually used by the Consolidated Gas Company in the manufacture and distribution of gas. The value of said property, as testified to by the Consolidated Gas Company on the condemnation proceedings, was $2,655,000.

"The commission also had before it the return of the Consolidated

Gas Company made to the State Board of Tax Commissioners for the purpose of taxation, which return was duly verified. The value of the property of the company, as shown by the return to the State Tax Commissioners June 30, 1905, exclusive of franchise, allowing for depreciation of the real estate, plant, mains, services and material and also meters, supplies and other personal property, was $27,408,700.91. It was contended by the company that the amount so returned to the State Board of Tax Commissioners did not represent the true value. But all of this testimony, with other pertinent evidence, was considered by the commission in arriving at the value of the property of the Consolidated Gas Company actually used in the manufacture and distribution of gas.

"In allowing a fair return upon the value of the property actually employed in the gas-making business, account has been taken of the nature and hazard of the business and of the return allowed on similar investments.

"The commission thinks that 8 per cent. is a reasonable return upon the actual value of the property owned by the company and used in the manufacture and distribution of gas. It will be remembered that this return is not based upon the capitalization of the company, but upon the actual capital engaged in the manufacture and distribution of gas.

"It was strenuously urged before the commission on behalf of the company that the commission should allow the capitalization of the company's franchise as it was assessed by the State Board of
53 Tax Commissioners at $7,781,000. And upon this the company paid a yearly tax, which entitled the company as a matter of law to such capitalization. On the evidence before the commission it is questionable whether the Consolidated Gas Company has franchises of any considerable value. The commission believes that these franchises, granted by the people without compensation, should not be capitalized against the public, thereby compelling the public to pay a profit upon the value of the favor granted by it. The seeming injustice of requiring a corporation to pay taxes upon a franchise and at the same time refusing to allow the capitalization of that franchise is sophistical, not real. The franchise tax is paid by the corporation but charged against the public as an expense of operation, and in reality is therefore paid by the consumer, not by the company.

"The Astoria Light, Heat & Power Company is building a plant at Astoria, Long Island, and proposes building a tunnel under the East River connecting its works with the distributing system of the Consolidated Gas Company in Manhattan. The Consolidated Gas Company is the owner of all of the capital stock of the Astoria Company. Large expenditures have already been made in the construction of its first unit, which unit will have a total capacity of 20,000,000 cubic feet per day, while the plant when completed will eventually produce an amount of gas equivalent to that now sold by the Consolidated Gas Company on the Island of Manhattan, including that purchased from other companies by it. Considerable evidence was taken in reference to the Astoria plant and the pro-

posed removal of the Consolidated manufacturing plant thereto. The company claims that such removal from the island of Manhattan is made in obedience to a public demand therefor. In any event, the commission believes that the prospective economies in the cost of manufacture and the increase in the sale of gas by reason of the reduction in price will enable the company to pay a reasonable return on any necessary investment in Astoria.

54 "This conclusion was arrived at by the commission after a most exhaustive and painstaking hearing and investigation covering a period of nearly three months, in the course of which the plants of the company were examined and over 5,000 pages of testimony taken.

"It will be remembered that this investigation was not initiated by the commission, as it has no authority to inquire into and fix the price of gas in the city of New York or elsewhere, except upon the complaint of 100 or more customers of the company complained against, or upon the complaint of the Mayor of the city. After such complaint was made such investigation was commenced, and the commission then had but one duty to perform, and that was to proceed with the same as carefully and as expeditiously as possible.

"The commission believes that the natural increase in gas sales will be greatly stimulated by the reduction in price and is satisfied that the price fixed is fair to the consumer, the public and the company."

February 23, 1906.

55 Endorsed: Circuit Court of the United States, Southern District of New York. Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District Attorney of New York County, Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and the City of New York, Defendants. In Equity. Bill of Complaint. Shearman & Sterling, Solicitors for Complainant. U. S. Circuit Court Southern District of New York. Filed May 1, 1906. John A. Shields, Clerk.

56 The President of the United States of America to Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District Attorney of New York

[L. S.] County, Frederick E. Gunnison, John C. Davis and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and the City of New York, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of June A. D. 1906 wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Consolidated Gas Company of New York and do further and receive what the said Court shall have con-

sidered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 1st day of May in the year of our Lord one thousand nine hundred and six and of the Independence of the United States of America, the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

SHEARMAN & STERLING,
Solicitors for Complainant.

The Defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of June 1906, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

57 I hereby certify, That on the 2nd day of May 1906, at the City of New York, in my district, I served the within Subpœna in Equity upon the within-named Defendant Julius M. Mayer, as Attorney-General of the State of New York, by exhibiting to Ernest A. Needham, Clerk in charge of the office of the Attorney-General of the State of New York at 27 William Street, the within original, and at the same time leaving with him a copy thereof, as per admission of service endorsed upon this original.

I hereby further certify, That on the 2nd day of May 1906, at the City of New York, in my District, I personally served the within Subpœna in Equity upon the within named Defendant William Travers Jerome as District Attorney of New York County, by exhibiting to him at the Criminal Court Building, Centre and Franklin Streets, the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, That on the 2nd day of May 1906, at the City of New York, in my District, I served the within Subpœna in Equity upon the within-named Defendant The New York State Commission of Gas and Electricity by exhibiting to Frederic E. Gunnison as a member of the said Commission, at 5 Nassau Street, the within original, and at the same time leaving with him a copy thereof for himself and one for each of his associate members on said Commission, John C. Davies and Lucian L. Shedden.

I hereby certify, That on the 2nd day of May 1906, at the City of New York, in my District, I served the within Subpœna in Equity upon the within-named Defendant The City of New York, by
58 exhibiting to John J. Delany as Corporation Counsel of the City of New York, at 2 Tryon Row, the within original, and at the same time leaving with him a copy thereof.

Dated, N. Y. May 2nd 1906.

WM. HENKEL,
United States Marshal, S. D. N. Y.

Endorsed: Copy of the within paper received this 2 day of May 1906. Julius M. Mayer, Attorney General, Ernest A. Needham. U. S. Circuit Court Southern District of New York. Filed May 2, 1906. John A. Shields, Clerk.

59 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK
against
JULIUS M. MAYER, as Attorney-General of the State of New York, and Others.

Temporary Restraining Order.

The complainant having moved upon the bill of complaint and various affidavits for an injunction, during the pendency of this action, against the defendants, to restrain them and each of them and each and every person acting under or by virtue of the authority of the Acts of the Legislature and Order of the Commission of Gas and Electricity, specified in the bill of complaint, from in any way enforcing or attempting to enforce the said Acts and Order, or any provisions thereof, against the complainant and the defendants having appeared on May 12, 1906, and applied for an adjournment of the said motion and such adjournment having been granted by the Court to May 17, 1906; and the defendants having then applied for a further adjournment of the said action, and the said application having been granted, defendants opposing, upon condition that a temporary restraining order should be entered herein; and it appearing that the complainant demands and claims to be entitled to a decree
59*a* against the defendants, restraining the commission of the acts hereinafter enjoined, upon the ground that they would result in irreparable injury to the complainant and would constitute a taking of complainant's property for public and private use, without due process of law and without just compensation, and would constitute a denial to the complainant of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States and would impair the obligation of the complainant's contract rights in violation of Section 10 of Article 1 of the Constitution of the United States, and would result in a multiplicity of suits, and that the complainant has no adequate remedy at law for the injury which would result from the threatened acts of the defendants, it is

Ordered:

I. That, until the entry of an order upon the said motion, the defendants, and each of them, their officers, agents, servants and employees, and each and every person acting under and by virtue of the authority of the Acts and Order referred to in the bill of complaint, or any of them, be and they hereby are enjoined and restrained from in any way enforcing or attempting to enforce the said Acts and Order, or any of the provisions thereof, against the complainant.

II. That, until the entry of an order upon the said motion, the complainant may make the same charge for gas furnished since April 30, 1906, to its consumers other than the defendant, the City of New York, as that which it has heretofore made, namely $1 per thousand cubic feet, notwithstanding the said Acts and Order, pro-

vided it pay into the Citizens Central National Bank of this City, as hereinafter provided forthwith a sum estimated to represent 20 cents per thousand cubic feet upon all gas so furnished for the month of May, 1906, such sum to be 20% of the amount received by the complainant for gas furnished to its customers during the month of May, 1905, and that, at the beginning of each week thereafter during the continuance of this order, it pay in like manner a further
59*b* sum, estimated to represent 20 cents per thousand cubic feet, upon all gas so furnished for the ensuing week, such sum to be 20% of the amount received by the complainant for gas furnished to its customers in the corresponding week in 1905; and provided also that as soon as possible after the end of each calendar month, not exceeding, however, the period of six days, the complainant file with the Clerk of this Court an affidavit showing, in detail, the name and address of each customer, or such facts as may be sufficient to identify such customer to whom gas had been furnished and the amount collected during such calendar month from each said customer for such gas in excess of 80 cents per thousand cubic feet. At the time of filing such affidavit, the complainant shall be entitled to credit for any sums paid into said bank as hereinafter directed in excess of 20 cents per thousand cubic feet of gas supplied to such customers subsequent to April 30, 1906, and in case there should be any deficiency in such amount, the complainant shall forthwith pay the same to the said Bank.

III. That the money so paid into the said Citizens Central National Bank shall be by it received and held as a special deposit, appropriately entitled, upon which interest at the rate of two and one-half per centum per annum shall be paid, and that the same shall be paid out only upon draft of the Special Master hereby appointed countersigned by a federal judge sitting in this Court. In order to facilitate the return of the moneys so deposited in the event of a decision of this Court directing such return, John A. Shields, Esq., of this City is hereby appointed a Special Master to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected as Special Master, although Clerk of the Court for the reason that the claimants of the fund will be extremely numerous and their identity and amount of their claims will have to be established by incessant references to the sworn statements of the gas companies which will be filed in the Circuit Court and be kept in the Clerk's custody,
59*c* and such reports can be more expeditiously and economically consulted by a special master, whose place of business is in the Federal Building.

IV. That all sums paid in under this order shall be held subject to the further order of the Court.

V. That the argument for the motion of a temporary injunction herein be adjourned until June 4, 1906, at eleven o'clock A. M., and that the defendants serve on the solicitors for the complaint any affidavits which they may desire to use in opposition to complainant's said motion on or prior to June 1, 1906.

New York, May 18, 1906.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Endorsed: U. S. Circuit Court, Southern District of New York. Consolidated Gas Company of New York, against Julius M. Mayer, as Attorney General of the State of New York, and others. Temporary restraining order. Shearman & Sterling, Attorneys for Complainant, 44 Wall Street, N. Y. U. S. Circuit Court, Southern District of New York, Filed May 18, 1906, John A. Shields, Clerk.

59*d* Circuit Court of the United States, Southern District of New York. In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Answer of Defendants, Attorney General, District Attorney, and State Commission of Gas and Electricity.

The joint and several answer of Julius M. Mayer, as Attorney General of the State of New York, William Travers Jerome, as District Attorney of New York County, and Frederic E. Gunnison, John C. Davies, and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, to the bill of Complaint of the Consolidated Gas Company of New York complainant.

60 These defendants, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the Complainant's said Bill of Complaint contained, for answer thereunto, or to so much or such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say upon information and belief:

First. That they admit that the Complainant is a corporation incorporated for the purpose of manufacturing and selling gas in the City and County of New York, under and by virtue of a consolidation agreement, pursuant to the statute of the State of New York, executed by and on behalf of the several corporations of the date, and to such purpose and effect as is in the said Bill of Complaint at Subdivision I thereof mentioned and set forth. That the said agreement was thereafter filed in the office of the Secretary of State of the State of New York, and of the Clerk of the County of New York, as and on the date set forth in said subdivision of said Bill of Complaint, and that the complainant was organized as a corporation thereunder for the period and with the right to extend its corporate existence as and in the manner in said subdivision I of said Bill of Complaint is set forth.

Second. These defendants admit that the complainant became

the owner of mains, pipes and conductors theretofore laid in the various streets, highways and public places in the City and County of New York by the said predecessor companies; and that it also became thereby the owner of large and expensive works for the manufacture and distribution of gas, which had been erected by the said predecessor companies; and that the said complain-
61 ant has, ever since, been engaged in the business of manufacturing and selling gas to the inhabitants of the said City and County of New York and to the City of New York, and has maintained and operated the said mains, pipes and conductors, or some portion thereof, in the said streets, highways and public places of the said City and County of New York, and has laid additional mains, pipes and conductors therein, but these defendants do not know and have not been informed save by the complainant's bill whether the same have been laid with the consent of the municipal authorities of the said City. But these defendants deny that by virtue of the said consolidation agreement, or otherwise, the complainant became the owner of various franchises or consents obtained by its predecessor Companies authorizing them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places of the City and County of New York, but, on the contrary thereof, allege the truth to be that the said franchises and consents held by the New York Gas Light Company and the Manhattan Gas Light Company, which related to all that part of the City and County of New York south of Forty-second Street, had expired by the limitation of their terms and had not been renewed. That the said franchises and consents held by the remaining Companies did not run to the successors thereof. These defendants admit that there were and are, as is alleged in the II subdivision of said Complaint, other gas Companies engaged in the manufacture, sale and distribution of gas in the City of New York, as well as a number of electric light companies engaged in distributing electric light to the inhabitants of the said City, but these
62 defendants allege the truth to be that all such gas and electric light Companies that distribute gas within the County of New York are owned or controlled by the complainant, and that the complainant has a monopoly of the gas and electric lighting business in the County of New York.

Third. These defendants further answering say each for himself that he knows not and has not been informed save by the said complainant's Bill, and cannot set forth whether the complainant has duly or otherwise complied with all the requirements of the several statutes mentioned in subdivision III of said bill of complaint.

Fourth. That these defendants verily believe that the true tenor and effect of Chapters 736 and 737 of the Laws of 1905, are as set forth in subdivisions IV and V of said Bill of Complaint, and that true copies thereof are annexed to the said bill of complaint and marked Exhibits A and B, but for greater certainty these defendants crave leave to refer to the originals or to the duly authenticated copies thereof when the same shall be produced. And they admit

that the defendants, Gunnison, Davies and Shedden were duly appointed commissioners under and by virtue of said Chapter 737.

Fifth. That these defendants admit that the City of New York is a domestic municipal corporation, organized, existing and situated as in the VI subdivision is alleged, and that it has been a customer of the complainant, but they deny that the City of New York itself is, and for many years past has been a customer of the complainant,
63 in the same sense and in the same way and under the same legal conditions as each and every other customer of the complainant in the said City. But these defendants know not and have not been informed save by the said complainant's bill as to the amount of gas consumed by said city in the year 1905.

Sixth. These defendants admit that Gunnison, Davies and Shedden at the times therein referred to constituted and still constitute the commission of Gas and Electricity of the State of New York established by an act, Chapter 737 of the Laws of 1905, having a branch office in the City of New York, and by virtue of said act having the powers conferred upon them as is alleged in the VII subdivision of said bill of complaint, and also that compliance with the orders of said commission may be enforced by an application for a writ of mandamus, as set forth in said subdivision of said bill of complaint.

Seventh. These defendants admit that on or about the 8th of November, 1905, copies of two complaints, each signed by one hundred or more customers of the complainant, charging that the price charged by the said complainant for gas was excessive and unreasonable and praying that the same might be reduced, were received by said commission; and that the defendants Gunnison, Davies and Shedden, as the Commission of Gas and Electricity of the State of New York gave notice to the complainant of a public hearing on said complaints, and they allege that the said hearings were commenced on the 20th day of November, 1905, and that the complainant appeared on said date by attorney and that the hearings proceeded until and including the 24th day of January, 1906, and that witnesses were produced for and against
64 the complainant and the same were examined or cross-examined in full by the complainant's attorneys, and that the testimony taken at such hearing consists of 2,223 printed pages, and that upon said hearings it appeared by the clear preponderance of evidence that the reasonable cost of manufacturing and distributing the same, allowing for all the expenses of administering and carrying on the said business, and allowing for depreciation and replacement of plant and for repairs and for taxes, and for all legal allowances, did not exceed 62 cents per thousand cubic feet, and that the reasonable value of the property of the complainant actually engaged in said business did not exceed the sum of $30,000,000, and that 80 cents per thousand cubic feet would be a fair and reasonable price for the said complainant to charge for gas in the City of New York, and they allege that eighty cents per thousand cubic feet is to the complainant a fair and reasonable price to charge therefor; and they allege that after due deliberation had

upon said evidence the aforesaid defendants made the order a copy of which is annexed to the bill of complaint and marked Exhibit C. That the said order requires a reduction of twenty cents per thousand cubic feet from the price of one dollar per thousand cubic feet heretofore charged by the complainant pursuant to Chapter 385 of the Laws of 1897 by which the maximum price of gas in the City of New York was fixed for the year 1901 and subsequently at one dollar per thousand cubic feet, but these defendants deny that one dollar per thousand cubic feet is now a reasonable price for the said complainant to charge for gas in the City of New York.

Eighth. These defendants verily believe that the true tenor and effect of Chapter 125 of the Laws of 1906 of the State of
65 New York is as set forth in subdivision IX of the said bill of complaint and that a true copy thereof is annexed to the said bill of complaint and marked Exhibit D, but for greater certainty these defendants crave leave to refer to the original or to the duly authenticated copy thereof when the same shall be produced.

Ninth. Further answering, these defendants admit that the complainant was originally incorporated by consolidation in the year 1884, pursuant to Chapter 367 of the Laws of New York of that year. That the said act provided that the capital of the consolidated corporation, organized thereunder, should not be larger in amount than the fair aggregate value of the property franchises and rights of the several companies thus consolidated. These defendants admit that for the purposes of such consolidation the property was appraised at the sum of $29,994,000., exclusive of the alleged franchise and rights of the company which was estimated at $7,781,000, and that the aggregate value of the property franchises and rights of the said companies were accordingly estimated at the sum of $37,775,000, but these defendants deny that they have any knowledge or information sufficient to form a belief as to whether said appraisal was made by disinterested persons and they deny that that amount of stock was issued to the stockholders of the various constituent companies, but on the contrary thereof state the truth to be that stock to the amount of $39,078,000. was issued by the said Consolidated Company of which $35,430,060 was issued for the acquisition of the property and franchises of the constituent companies, subject to certain indebtedness, and that the remain-
66 ing $3,647,940 was held in the treasury to provide for this indebtedness and subsequently issued. These defendants deny that the issue of such stock created a contract between the complainant and the State of New York under which complainant has a right to earn a fair return upon the stock so issued. These defendants further deny that the stock so issued represented the fair aggregate value of the property franchises and rights for which it was issued, as required by Chapter 367 of the Laws of 1884, of the State of New York, but on the contrary thereof alleges that the total capital stock of the consolidated companies amounted to $17,600,000, and their outstanding indebtedness amounted to $3,415,150.76, making a total of $20,415,150.76, and that the total cost of the prop-

erties of the said companies was $20,942,632.85, and that the full value in 1884 at the time of the said consolidation did not exceed that sum. These defendants further answering admit that the authorized capital stock of the said complainant has since 1884 been increased in various amounts and at various times to the aggregate of $100,000,000. par value, $80,000,000. par value of which is issued and outstanding, but these defendants deny that the said increased stock has been lawfully issued and allege as to said increase of capital stock that in April, 1900, the capital stock of the complainant was increased to $54,595,200., and the increased stock amounting to $15,517,200. was exchanged for debentures of the complainant, said debentures having been issued for the purchase of the entire stock of the New York Gas and Electric Light, Heat & Power Company, amounting to $36,000,000 par value, which said

67 stock was intrinsically worthless and was purchased by said complainant not for the use and lawful purpose of said complainant but to secure the control of the Electric Light industry, and to give the complainant a monopoly of the lightning business in said City of New York. That thereafter the said shares of the said Power Company were exchanged for substantially the entire capital stock of the New York Edison Company, a corporation representing a merger of electric properties and the stock of which was intrinsically worthless, being subject to a bonded indebtedness in excess of the value of all its assets; the complainant has not received any dividends on the said shares either of said Power Company or said Edison Company. That in July, 1900, the capital stock of the complainant was increased to $80,000,000, that of the increased stock $3,773,600 par value was exchanged for debentures of the complainant which had been issued to purchase $7,170,142. par value of the stock of the New Amsterdam Gas Company, which said stock was intrinsically worthless and was purchased by said complainant, not for the use and lawful purposes of said complainant but to secure the control of the said New Amsterdam Gas Company to give the complainant a monopoly of the lighting business in the County of New York. The said debentures and said debentures issued for the purchase of the stock of the said Power Company were not secured by any mortgage or other lien upon the property of the complainant, and the issue of said increased stock in exchange therefor, was without authority of and was contrary to the laws of the State of New York. These defendants further answering allege

That the proceeds of the remaining $21,631,200 of increased stock were used only to a small, if any extent, in the ac-

68 quisition of plant or property for the manufacture and distribution of gas by the complainant, and that the proceeds of not less than $21,000,000 of said increased stock, as defendants are informed and believe, were used exclusively for the purchase by the complainant of stock and bonds of other companies engaged in the manufacture and sale of gas and in generating and distributing electric current in the county of New York, including a majority of the stock of the New Amsterdam Gas Company, the

Standard Gas Light Company, the New York Mutual Gas Light Company, and the United Electric Light and Power Company; that the said purchases were made by the complainant for the sole purpose of securing the control of the said corporations and thereby obtaining a monopoly of all the lighting business in the county of New York, and that by these last purchases, and with the holdings of said complainant theretofore acquired, the complainant has obtained and now has a monopoly of the lighting business, both gas and electric, in said county.

These defendants deny that the complainant, in the case of every increase of stock, has realized for the additional stock issued, either in cash or property or in payment of indebtedness, an amount greatly in excess of the par value of the stock so issued. These defendants allege that the shares of the said New Amsterdam Gas Company are intrinsically worthless and that the shares of the said United Electric Light and Power Company are not of any substantial value, and that the complainant has never received, as defendants are informed and believe, any dividends upon any of said shares; and that of the said additional stock issued by the
69 complainant on the increase thereof from $39,078,000 to $80,000,000, and issued for the purpose of acquiring securities as aforesaid, not less than $23,000,000 were used for the purpose of acquiring securities of no value, save as they might be used by the complainant to complete its monopoly of said business.

These defendants further admit that the complainant has issued at par and that there is now outstanding its debentures to the amount of $19,857,600 as is in said bill of complaint alleged.

These defendants, further answering, admit that for many years the capital stock of the complainant was well and favorably known and regarded by the investing public, owing to the fact that the complainant owns a large and valuable property, well located in a prosperous metropolitan community, but they deny that the entire capitalization represents actual value, but on the contrary thereof allege that by reason of the complainants charging one dollar per one thousand cubic feet of gas, it has been enabled to pay dividends at the rate of eight per cent. on a capitalization of $80,000,000., when its actual investment in the gas making business did not exceed $30,000,000. These defendants further say that they know not and have not been informed save by the said complainant's Bill and cannot set forth whether the complainant's stock is widely held and by whom or where the said stockholders reside or the number of said stockholders.

Tenth. These defendants further answering say that they admit that the complainant has since its incorporation devoted certain sums of money to making additional improvements and extensions to its plant and works, and now owns plants, consisting of real estate, buildings, machinery, pipes and other apparatus, in
70 good order and repair, suitable and actually used for the purpose of manufacturing and distributing gas in said City and County of New York, but these defendants deny that the same represents a cost to the complainants of $40,000,000, and having

a present value in excess of that sum and allege the truth to be that the same, together with supplies and material on hand mentioned in the bill of complaint, represents a cost not to exceed $30,000,000, and that the present value, together with the value of said supplies and material on hand, does not exceed $27,500,000, exclusive of any value of its franchises, good will or business. These defendants further say that they know not and have not been informed save by said complainant's bill and cannot set forth whether the said complainant has a cash working capital necessary for the conduct of its business of $1,000,000 and bills and accounts receivable representing more than $2,000,000, but they deny that bills and accounts receivable are property which is to be taken into account in determining a fair and reasonable charge for gas. The defendants further answering deny that to provide a means of disposing of its by-products of the manufacture of gas, consisting of coal, tar and ammonia, it has invested $50,000 in such business. But these defendants say that the complainants have invested $50,000, the proceeds of the sale of $33,333.33 par value of its stock, in the stock of the National Coke & Coal Company, which Company carts the coke of complainants. These defendants admit that the complainant has acquired all the stock of the Astoria Light, Heat & Power Company, and that the said Astoria Light, Heat and Power Company has acquired land and has erected and in
71 course of erection buildings and improvements thereon, and that the complainant has loaned to said Astoria Light, Heat and Power Company sums of money to what extent these defendants know not and have not been informed save by the said complainant's bill. But they deny that the said loans to and purchases of stock of the Astoria Light, Heat and Power Company have increased the plant or capital account or property of the complainant which should be taken into consideration in determining the fair and reasonable price of gas sold by complainant. But they allege the said $5,500,000 alleged to have been invested in the Astoria Light, Heat and Power Company, and the $6,200,000 in cash and a further sum of $6,500,000 in temporary investments and loans, aggregating a sum in excess of $12,700,000 additional, temporarily held by complainants pending the completion of the plant of the Astoria Light, Heat & Power Company at Astoria if the same has been invested or is held as alleged, is all a portion of the proceeds of the $19,857,600 debenture bonds on which the complainant is paying 6 per cent. interest. These defendants deny that complainant's actual investment in its business of making and selling gas at the time the said order was adopted was $62,000,000, exclusive of the value of its franchise and right and exclusive of the value of its other intangible property, if any of either it has. These defendants know not and have not been informed save by the said complainant's bill and can not set forth whether the complainant's business has always been managed in an economical and skillful manner, with the highest regard for the safety and convenience of the public, but they deny that the prices charged to inhabitants of the City and

County of New York by the said complainant for gas have
72 always been reasonable and have been lowered from time to time by the complainant as rapidly as was warranted by the decrease in the cost of manufacture and distribution, as is alleged in said bill of complaint, and these defendants also deny that the complainant has always performed its duties in a manner satisfactory to the inhabitants of the City and County of New York, and that the quantity has been sufficient and the quality of such gas has been excellent. But, on the contrary thereof, alleged that the price of gas in the City of New York was reduced by Chapter 385 of the Laws of 1897 of the State of New York from $1.25 per thousand cubic feet to $1 per thousand cubic feet in 1901 and thereafter for private consumers, and to ninety cents per thousand cubic feet for gas for the use of the City of New York. And that by reason of the widespread complaint of the quality and price charged for said gas by the inhabitants of the said City of New York, and of the inordinate pressure under which gas was delivered to the customers by the complainant the Legislature of the State of New York appointed a Committee to investigate the same, and as a result of that investigation the remedial legislation, which is attacked in this suit, was passed.

Eleventh. These defendants admit that the price of gas in the City of New York has been gradually reduced from $2.25 per thousand cubic feet, but deny that the price charged for gas has always been as low as prices charged by other manufacturers of gas in communities corresponding in size and in other conditions to the said City and County of New York. Defendants admit that one dollar per thousand cubic feet for gas is lower than the average price charged throughout the State of New York, but these
73 defendants allege that there is no other city in the State of New York where there is the same amount of gas manufactured and sold nor where there is the same number of meters per mile of mains, nor so high an average consumption of gas per meter, nor where any of the conditions would be so favorable to as cheap cost in manufacture and delivery of gas as in the City of New York. These defendants deny that in view of the local conditions now prevailing in the City of New York and other conditions as to candle power, pressure and purity, and in respect to the cost of construction and labor, coal, naphtha, oil and other materials used in the manufacture of gas, the market for residuals or by-products, and the other conditions upon which the cost of manufacturing and distributing gas depends, the price of one dollar per thousand cubic feet is relatively as low a price as the prices charged in any other city or town in the said state or elsewhere in the eastern part of the United States, or as low as business prudence would have justified the complainant in adopting and charging.

Twelfth. Further answering, these defendants say that they know not and have not been informed save by the said complainant's bill whether since its organization in 1884, the complainant has declared and paid dividends to its stockholders, averaging much less than eight per cent. But these defendants allege the truth to be that dur-

ing the period from 1901 to date, while the price of gas in the City of New York was fixed by law, as aforesaid, the complainant has paid from the profits of its gas-making business dividends of at least eight per cent. per annum on its entire capital stock of $80,000,000
74 in par value, although its investment in its own business of making and selling gas does not exceed $30,000,000, and despite the fact that upon its large investment in the stocks of other companies on which the complainant has received a very slight income, and had the said profits been applied to the payment of dividends on the capital invested by complainant in its gas business, the rate of dividend would have ranged between sixteen and twenty-three per cent. per annum in the same period. These defendants admit that the said complainant has devoted a portion of its earnings to making replacements, additions, extensions, improvements and acquisitions necessary for it to carry on its business, and that complainant has constantly maintained, improved and extended its system of pipes, mains, feeders and plants, and that some gas mains and pipes have been newly laid and that it has to some extent rebuilt and enlarged portions of its plant since 1884 and that it has purchased some additional real estate, built and constructed some additional buildings and installed some additional machinery to the extent of increasing the cost of its plant by the sum of about $9,000,000. That as defendants are informed and believe that the present value of said plant has not been increased thereby to exceed $27,500,000. These defendants further say that all the said matters and things were fully and in detail proved before the joint committee of the Senate and Assembly of the State of New York hereinbefore mentioned, in 1905, and before the New York State Gas Commission in 1906, and in ascertaining a fair and reasonable rate for the said complainant to charge due consideration was given thereto in fixing said rate at eighty cents per thousand cubic feet.

75 *Thirteenth.* These defendants, further answering, admit that it is necessary for the complainants to charge a price for gas sufficient to include the reasonable cost of materials, wages, insurance, taxes, office expenses, superintendence and expenses of management and such other expenses as are reasonably necessary, as part of the current annual cost of the manufacture and distributing of gas in the said City of New York; a reasonable allowance to make such reasonable repairs and renewals as may be rendered necessary by wear and tear. But these defendants deny that it is necessary or proper for the complainant to charge a price for gas sufficient to enable it in addition to the outlays aforesaid, and in addition to the proper and fair return upon its investment, to extend its plant or to make new installations, or for the purpose of reconstruction or enlargement. These defendants further say that in fixing the reasonable price to be charged for gas by the complainant in the City of New York at eighty cents for a thousand cubic feet, the Legislature of the State of New York and the New York State Gas Commission took into consideration all the items of outlay in making and distributing gas and a proper allowance for repairs and replacements,

including all matters necessary to be considered in order to allow a fair return upon its investment, and made due allowance therefor in the light of the actual experience of the complainant in its operations. These defendants deny that it is proper to charge the public as a part of the expense for the manufacture and sale of gas any additions to its plant, to enable the complainant to meet the constantly increasing demand for gas; but that such additions will properly be taken care of from the profits accruing from the
76 increased sale of gas. These defendants admit that it has been necessary for the complainant, since its organization in 1884 to expend a large amount annually in repairs and replacements to its buildings, plant, equipment, mains and services but these defendants allege that all said expenditures have been paid by the complainant out of the proceeds of its sales of gas, and have been treated as a part of the expense of its operation, and that the amount of these expenses and the experience of the complainant in relation thereto, were fairly taken into consideration in fixing the price of gas at eighty cents per one thousand cubic feet, as aforesaid.

These defendants further allege that since 1884, the complainant's investment in its gas making plant has been increased to the extent of about $9,000,000, and that the value of the property so acquired, is included in the present value of the complainant's investment in its gas making business, which does not exceed as defendants are informed and believe, the aggregate amount of $30,000,000 as aforesaid. These defendants say that they do not know to what extent it will be necessary for the complainants in the future to increase its real estate, plant, property and construction, but that it verily believes that the return for the same will be secured from the increased sale of gas produced by such increased plant, and that sales of gas at eighty cents per thousand cubic feet will give to the complainants an ample return for such investments, and upon the value of its entire property employed in its business.

Fourteenth. These defendants further answering, deny that by Chapter 737 of the Laws of 1905, any additional burden is
77 placed upon complainants, by reason of the provisions thereof as set forth in the XV subdivision of the said Bill of Complaint. They deny that it is necessary for any reason that the complainant should be permitted to earn enough to maintain the cash value of its plant at a sum equal to its outstanding stocks and bonds, (or debentures), or that it has any right to have the cash value of its plant maintained at such a sum and they aver that the present cash value of its property employed in its gas making business is about $70,000,000, less than the par value of its present outstanding stock and bonds (or debentures), and further these defendants submit that there is no allegation of facts contained in said subdivision XV that need be answered by these defendants.

Fifteenth. These defendants further answering, state that the order of the New York State Gas Commission and Chapter 125 of the Laws of 1906 of the State of New York, in fixing the price to be charged by this complainant gives a price sufficient to cover the reasonable cost of manufacture and distribution of the same with an

allowance sufficient to prevent the depreciation of the complainant's plant, and also a fair and reasonable profit on the value of the property owned and used by it in its said business, and that they deny that the said order or act in any way contravene or violate the provisions of the fourteenth amendment to the Constitution of the United States.

Sixteenth. That these defendants further answering admit that the statements contained in the XVII subdivision of the said bill of complaint as to the provisions of Chapter 712 of the Laws of 1899, of the State of New York, and the assessment thereunder by the State Board of Tax Commissioners are substantially as therein
78 set forth, but they allege that the complainant is contesting the validity of the said assessment and the amount thereof in the courts of the State of New York, and that the said tax is based in large measure upon the power of the company to earn a sum over and above the average rate of income prevailing in the community upon the tangible property owned by it, and that if the complainant shall establish in the said proceeding in the courts of the State of New York, that it cannot earn any amount over and above any reasonable return upon the value of its tangible property, the said assessment must be and will be set aside.

The defendants further allege that as they are informed and believe, the complainant has not contested the said assessment upon the ground that, if it ever had any special franchises, most of them had expired and that the others would soon expire.

They alleged that the taxes assessed against the said complainant and its property, were taken into consideration and due allowance made therefor in fixing the price of gas at eighty cents per thousand cubic feet, but these defendants deny that such special franchises which have been received by the complainant without cost to it from the public can be legally capitalized and the public compelled to pay an additional sum as a return upon the value of such franchises. These defendants deny that Exhibit E attached to the Complaint is a memorandum or opinion of the State Commission of Gas and Electricity which was filed with their order, and these defendants deny that any memorandum or opinion was so filed by the said Commission.

Seventeenth. These defendants further answering, deny that
79 the actual and reasonable cost to the said complainant of manufacturing and distributing gas during the four years prior to 1905 exclusive of any allowance for repairs or for a fair annual return upon the intangible property employed by the complainant in its business, including franchise rights if any but adding thereto an allowance of three cents per thousand cubic feet of gas for contingencies and of 2.62 cents per thousand cubic feet for increased illuminating power averaged about 67 cents per thousand cubic feet; and these defendants deny that the reasonable cost to complainants for manufacturing and distributing gas during the year 1906 will be in excess of seventy cents per thousand cubic feet, but on the contrary thereof allege the truth to be that the said cost will not exceed sixty-two cents per thousand cubic feet, making the due al-

lowances for depreciation and increase in illuminating power, as aforesaid.

Eighteenth. These defendants further answering, deny that the reasonable value of the plant and investment of the complainant employed in the manufacture and distribution of gas is nearly $62,000,000, but on the contrary thereof state the truth to be that the same does not exceed $30,000,000. These defendants deny that the assessed value of the complainant's franchise rights as fixed by the State Board of Tax Commissioners for the purposes of taxation should be added to the value of the complainant's plant for the purpose of estimating a return upon the capital of the complainant engaged in its business, and these defendants deny that the said complainant is possessed of intangible property, which constitutes an integral and important part of its business; the defendants state that the value of connections between the pipes and mains of the complainant and the various buildings throughout the City
80 of New York has been allowed for in the valuation of the complainant's plant, as hereinbefore set forth. These defendants have no knowledge or information of any contracts owned by the complainant in connection with its business. These defendants deny that the organization of the complainant's business and good will and the various other elements of value which are in said bill alleged to have been created and developed by the complainant and its predecessors through intelligent and efficient business management during the past three-quarters of a century and fidelity to their engagement possess the attributes of property, or that the same can be taken into consideration in estimating the capital upon which the complainant is entitled to a return, and these defendants deny that said alleged intangible property possesses very great or any value whatever.

These defendants further allege the fact to be that the conduct by the complainant of its business, and the manipulations of its stock issues, and its successful endeavors to monopolize the lighting industry in the County of New York, have been viewed with disfavor by the public, and that the complainant has no good will of value, but that on the contrary, it owes its custom not to the manner in which it has conducted its business, but to the absence of competition.

These defendants deny that the reasonable profit upon the said investments to which the complainant is entitled and the enjoyment of which is guaranteed to it by the fourteenth amendment to the Constitution of the United States is at leas- 10% per annum. These defendants deny that the amount of profit to which complainant is entitled is in excess of $8,500,000 per year, and these defendants deny that in order to earn 10% that it will be necessary for the complainants to receive the sum of about 64 cents per thou-
81 sand cubic feet in addition to the actual reasonable cost of manufacturing and distributing gas which is alleged in said bill to be a sum in excess of 70 cents per thousand cubic feet, making a total of $1.34 per thousand cubic feet for gas. These defendants deny that taking all the circumstances of the case and the in-

terests of both the company and of the inhabitants of the City and County of New York, as well as of the defendant, the City of New York, into account, the fair, just and reasonable price for gas in the said city at the date of the said order of February 23rd, 1906, and at the present time, could not possibly be less than $1.00 per thousand cubic feet, on the contrary thereof these defendants allege that the rate of eighty cents per thousand cubic feet fixed by the said Commission and the law of the State of New York as aforesaid will permit a fair, just and reasonable profit to the complainant, and these defendants deny that the said rate of eighty cents per thousand cubic feet will permit a profit of only ten cents per thousand cubic feet to the complainant.

Nineteenth. These defendants deny the allegations contained in the XX subdivision of said bill, that the price of eighty cents per thousand cubic feet fixed by the said Commission by the order aforesaid was not in fact based upon the reasonable cost to the complainant of manufacturing and distributing gas in said City and County, and does not bear any relation to such reasonable cost or to the amount reasonably necessary to be allowed for depreciation, as aforesaid, or to the amount required to furnish a reasonable return to the complainant upon its capital stock, or upon a fair value of the property owned and used by it in its said business; but on the contrary thereof these defendants allege the truth to be that each and every of the aforesaid matters and things taken into consideration
82 by the said Commission in fixing the price aforesaid. And these defendants deny that the same would be an unreasonable and confiscatory rate of compensation for the gas supplied by the complainant.

Twentieth. These defendants further answering, deny that the opinion or statement attached to the Bill of Complaint and marked Exhibit E was rendered by the said Commission in connection with its said order. These defendants further state that the said Commission rendered no opinion and that Exhibit E is a statement made to the public press merely, and does not fully state the grounds of the decision of the Commission. These defendants aver the truth to be that the reasonable value of the property actually employed by the complainant in the manufacture and distribution of gas on October 31st, 1905, did not exceed the sum of $30,000,000 and deny that the reasonable value of said property is in excess of the sum of $86,000,000. These defendants further deny that in determining the value of complainant's plant the said Commission deducted the sum of $2,665,000 as the value of the plant formerly used by the complainants for the manufacture and distribution of gas, which has been taken by the City of New York in condemnation proceedings. These defendants further state that the said Commission did consider eight per cent. a percentage of profit upon the actual value of the property owned and used in the manufacture and distribution of gas reasonable to this complainant and to other manufacturers of gas in the City of New York and in excess of the returns commonly to be obtained upon investments of like character, and these defendants deny that such percentage is unreasonably low, and

that if the complainant is limited to such return, it will be
83 deprived of its property without due process of law in violation of the Constitution of the United States.

These defendants further allege that a profit of eight per cent. upon the actual value of property owned and used in the manufacture and distribution of gas after making allowance for all proper outlays, including the necessary repairs and replacements, would be a rate of return to which no just objection could be made on the part of the complainant, and that a price of gas which would result in a much lower rate of profit could not be regarded as unreasonable or confiscatory, nor could an act of the Legislature or any order of the State Commission fixing such a price, be properly regarded as in contravention of any provision of the Constitution of the United States. These defendants further deny that the complainant was entitled to earn any return upon the assessed value of its special franchise rights, as hereinbefore stated.

These defendants further deny that the complainants should be allowed anything for the expenditures for the construction of the plant at Astoria, as is hereinbefore at the tenth subdivision of this answer fully stated.

These defendants allege that the plant at Astoria mentioned in the complaint, is the property of the Astoria Light, Heat and Power Company, a corporation, and that the complainant is merely a stockholder and creditor thereof; that the price fixed by the legislation and order complained of in the bill of complaint, will enable the said Astoria Light, Heat and Power Company, as the defendants are informed and believe, to make a fair profit upon its investment in the business of making and distributing gas.

These defendants further answering, deny that the price
84 fixed in said order of February 23rd, 1906, is not a just, fair or reasonable compensation for the use of complainant's property, or a just, fair or reasonable return for the services rendered by the complainant. They further deny that the effect of said order of February 23rd, 1906, will be to reduce the gross income of the complainant below the actual and reasonable cost of manufacturing and distributing gas (including an allowance for depreciation of its plant and a fair profit upon the property owned and used by it in its said business), and they deny that it will prevent the complainant from fulfilling the purposes of its incorporation in performing the duties imposed upon it by the common law and by the statutes of this State, or that it will compel the complainant either to continue in said business without the fair profit to which it is entitled, or to abandon its business without the fair profit to which it is entitled.

Twenty-First. These defendants further answering, deny that Chapter 736 of the Laws of 1905, which fixes the price of gas supplied by the City of New York at 75 cents per thousand cubic feet, and regulates the pressure thereof is unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States; and they allege to the contrary thereof, that by reason of the reserved power in the State of New York of taxation and regulation

of public service corporations, it was competent for the State to prescribe the rates at which complainant should be allowed to deliver gas to the State or any subdivision thereof, and furthermore, these defendants allege that the said price gives to the complainant a fair and reasonable return for the gas furnished and services
85 rendered. These defendants further deny that Chapter 125 of the Laws of 1906 which fixed the price of gas furnished by the complainant to private consumers in the City and County of New York at the rate of eighty cents per thousand cubic feet, by reason of the fact that it does not apply to the municipality of New York is unconstitutional in violation of the fourteenth amendment to the Constitution of the United States. These defendants further deny that the order of the said Commission of Gas and Electricity prescribing the maximum price of eighty cents per thousand cubic feet is without authority of law, or is void, or is in violation of Chapter 736 of the Laws of 1905, or will deprive the complainant of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

The defendants further deny that Chapter 737 of the Laws of 1905, creating the State Commission of Gas and Electricity, is unconstitutional and void, or that it confers no authority upon the said Commission, or that it or any of its provisions is in violation of the Constitution of the State of New York or of the United States.

And these defendants allege that Chapter 737 of the Laws of 1905 of the State of New York, creating the State Commission of Gas and Electricity provides for an investigation and hearing at which the person or corporation complained of shall have an opportunity to be heard and may be represented by counsel. And further that before making such order the complainant had an opportunity to be and was heard by counsel and produced witnesses before the said Commission, and the said Chapter 737 of the Laws of 1905 provides for an appeal to the Appellate Division of the Supreme Court of the State of New York, that the complainant has taken such
86 an appeal to the Appellate Division of the Supreme Court of the State of New York in the First Department, and that said appeal is now pending therein. And that all the matters and things alleged in the XXII subdivision of the said Bill of Complaint wherein it is claimed that said Chapter 737 is in violation of the Constitution of the State of New York are before that court for determination. And these defendants allege that in as much as there is no federal question involved therein, that this Court has not jurisdiction to hear and determine the same. These defendants deny that all or any of said acts and the said order are unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States, as has been hereinbefore fully set forth.

Twenty-second. These defendants further answering, deny that it is a physical impossibility for the complainant to comply with the provisions in the said Statute and order in regard to pressure; but on the contrary thereof allege the same can be complied with by employment of well known methods of distribution and pressure

control. These defendants further allege that actions are already pending at law in the Supreme Court of the State of New York in which this question is involved and in which the complainant can obtain full and adequate relief, if it is entitled to any relief in the premises.

These defendants further say that they know not and have not been informed save by the complainant's bill whether the complainant now has upwards of 390,000 customers in the City and County of New York in addition to the said municipality of New York to whom it is daily selling and distributing gas. The defendants admit that the amount of gas so sold and distributed during
87 the year ending October 31st, 1905, exceeded 13,000,000 cubic feet. They deny that a large proportion of complainant's customers are people of small means who are financially irresponsible or that unless the Court shall grant a preliminary injunction herein the complainant will be irreparably damaged. And these defendants further answering, aver that by Section 66 of Chapter 566 of the Laws of 1890 of the State of New York, known as the Transportation Corporations Law, it is provided that every gas light corporation may require every person to which such corporation shall supply gas for lighting any building, room or premises to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required, or proposed to be used for two calendar months by such person, and the quantity of gas necessary to supply the same, as security for the payment for gas consumed during such period and that the complainant has exacted such deposit from all persons whom it had any reason to suppose to be irresponsible or about whom it had no information and now has in its possession a large sum of money, that said deposit on October 31st, 1905, amounted to $904,000, and is now believed to be a much larger amount, so deposited under agreements that the same is deposited as security for payment of bills rendered or to be rendered for gas supplied, and that the said sum now in possession of the complainant is sufficient to cover the 20% reduction provided by law on the bills of such persons for the next ten months.

Twenty-third. The defendants deny that if the said eighty cent gas rate should be enforced, or if the defendant Mayer, the Attorney General, or the defendant Jerome, the District Attorney, should begin prosecutions against the complainant for failure to
88 comply with the eighty cent rate, or if the defendants Gunnison, Davies and Shedden, constituting the Commission of Gas and Electricity, should institute mandamus proceedings to compel the enforcement of said rate in the event of the affirmance of the order of the said Commission by the Courts of the State of New York, that the complainant would necessarily be subjected to a multiplicity of suits. The defendants allege that the failure of the defendants Mayer and Jerome to begin prosecutions against the complainant, or the failure of the said Commissioners to institute mandamus proceedings, will not affect the rights or defences of consumers of gas, nor in the event that it be established that the enactments of the Legislature of the State of New York complained

of in the Bill of Complaint and the acts of the Commission pursuant thereto, are valid, will the complainant by reason of this suit or of any order herein, be excused from any penalty for which the complainant shall become liable by reason of its disobedience to the said laws of said order. The defendants deny that the said act and order fixing the said eighty cent gas rate or the enforcement thereof, now or hereafter, or the prosecution of any suits for penalties for the violation thereof, will cause to the complainant irreparable damage, or will deprive it of any assets, franchise or property, or of the equal protection of the laws in violation of any provision of the Constitution of the United States; and the defendants allege that if the plaintiff complies with the said rate of eighty cents, as prescribed in said legislation and order complained of, reserving to itself the right to make a further charge in the event that the said act shall be held to be void, it will not become liable to any of the said penalties, nor will any of the conditions arise that have been set forth in subdivisions XXIV and XXV of said Bill of
89 Complaint, and if the complainant shall succeed in this suit, it will not be subjected to any substantial loss, inasmuch as it will be able to recover the additional twenty cents per thousand cubic feet from its responsible customers, and will be able to deduct this amount from the deposits made as aforesaid by those whom it may deem irresponsible.

Twenty-fourth. That these defendants deny that the operation of the said order and statutes would cause the complainant to suffer irretrievable loss for the reasons set forth, and that these defendants deny that there is no remedy except in equity to test adequately and completely the said acts and order, and that in the absence of such remedy in equity the penalties provided in said acts and order would be unreasonable and confiscatory and would deprive the complainant of its liberty of contract and of its property without due process of law and without just compensation, and would likewise deny to it the equal protection of the laws in contravention of the fourte-nth amendment to the Constitution of the United States. And these defendants further answering, say that there is no statement of fact in the said XXV subdivision of said Bill that these defendants are required to answer.

Twenty-fifth. And this- defendant- submits to this Honorable Court that all and every of the matters in said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity, and these defendants hope that they shall have the same benefit of this defense as if they had demurred to the complainant's Bill.

Twenty-sixth. And the defendants further aver that the bill herein directed is against the defendants as officers of the State of New York; that it is in substance and reality a suit against the
90 State of New York; and that this Court has no jurisdiction thereof.

Twenty-seventh. And these defendants deny all unlawful combination and confederacy in the said bill charged, without that, that

any other matter or thing material or necessary for these defendants to make answer unto, and not herein or hereby, well and sufficiently answered unto, confessed or invited, traversed or denied is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver maintain and prove as this honorable Court shall direct; and hereby pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

JULIUS M. MAYER,
Attorney General of the State of New York.
WILLIAM TRAVERS JEROME,
District Attorney of the County of New York.
FREDERIC E. GUNNISON,
JOHN C. DAVIES AND
LUCIAN L. SHEDDEN,
Commission of Gas and Electricity of the State of New York, Defendants.

JULIUS M. MAYER,
Attorney General, Solicitor for Defendants Mayer, Gunnison, Davis and Shedden.
ROBERT C. TAYLOR,
Assistant District Attorney, Solicitor for Defendant Jerome.
CHARLES E. HUGHES,
ALFRED R. PAGE,
HOWARD S. GANS,
Of Counsel.

91 UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Julius M. Mayer, being duly sworn, says that he is the Attorney General of the State of New York, one of the defendants named in the Bill of Complaint herein, that he has read the foregoing answer and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JULIUS M. MAYER.

Sworn to before me this 4th day of June, 1906.
[SEAL.] WALTER G. MERRITT,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Julius M. Mayer, being duly sworn, deposes and says: That he lives at 375 West 123rd Street, in the City of New York, County of New York, and that his office is at 27 William Street, in said County; that he is an attorney and counsellor at law of the State of New York, duly admitted to practice in the Circuit Court of the United States of America for the Southern District of New York, and is Attorney General of the State of New York, and is solicitor for the defendants

Frederic E. Gunnison, John C. Davies and Lucien L. Shedden, sued as constituting the New York State Commission of Gas and Electricity; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the knowledge of
92 deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is made by deponent and not by said defendants or one of them is that no one of said defendants is in the said County of New York.

JULIUS M. MAYER.

Subscribed and sworn to before me this 4th day of June, 1906.
[SEAL.] WALTER G. MERRITT,
Notary Public, N. Y. County.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Robert C. Taylor, being duly sworn, deposes and says: That he resides at 13 Central Park, West, in the City of New York, County of New York; that his office is in the Criminal Courts Building, in said County, and that he is an attorney and counsellor at law of the State of New York, duly admitted to practice in the Circuit Court of the United States for the Southern District of New York and is solicitor for the defendant William Travers Jerome, sued as District Attorney; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the personal knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further states that, as to all matters therein stated
93 upon information and belief, the sources of his information and the grounds for his belief are conversations with Julius M. Mayer, Attorney General and Alfred R. Page, general knowledge of the investigation of the Committee of the Legislature known as the Stevens' Committee and of the pleadings and affidavits herein.

Deponent further says that the reason why this verification is made by deponent and not by said defendant William Travers Jerome is that said defendant is not within the said County of New York.

ROBERT C. TAYLOR.

Subscribed and sworn to before me this 4th day of June, 1906.
[SEAL.] JOHN J. SMITH, [SEAL.]
Notary Public, N. Y. Co.

94 Endorsed: Circuit Court of the United States, Southern District of New York. Consolidated Gas Company of New York, Complainant, again Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District Attorney of New York County, Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and the City of New York, Defendants. In

Equity. Answer. Julius M. Mayer, Attorney General of the State of N. Y. Solicitor for Defendants Mayer and Gunnison, Davies & Sheddon, as the Commission of Gas and Electricity. Robert C. Taylor, Solicitor for Wm. Travers Jerome, as District Attorney. U. S. Circuit Court, Southern District of N. Y. Filed June 4—1906, John A. Shields, Clerk.

95 *Answer of Defendant, The City of New York.*

Circuit Court of the United States, Southern District of New York.
In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney-General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The answer of The City of New York, one of the above-named defendants, to the Bill of Complaint of the Consolidated Gas Company of New York.

96 The said defendant, The City of New York, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering on information and belief:

I.

Denies the allegations contained in the paragraph or subdivision of the Bill of Complaint numbered "I."; and furthermore alleges that the said Consolidated Gas Company of New York is not and never was a corporation organized as alleged in the said paragraph "I."; and further, that the companies alleged in said paragraph "I." to have been consolidated were not, at or before said consolidation, as alleged, duly organized and existing under the laws of the State of New York, with property, powers and franchises as alleged in said paragraph "I."

II.

Admits that the said Consolidated Gas Company of New York has, through its constituent companies, for a number of years past been engaged in the manufacture and distribution of gas, and for that purpose has maintained and operated pipes, mains and conductors

in the streets, highways and public places in the City and County of New York, and that there are a number of electric light companies engaged in distributing electric light to the inhabitants of The City of New York; and denies each and every other allegation in said paragraph or subdivision of said Bill of Complaint numbered "II." And furthermore alleges that the said Consolidated Gas Company did not become the owner of the various franchises or consents of its said predecessor companies, as alleged in said paragraph "II."

97 And furthermore that it did not become the owner or entitled to maintain and operate the mains, pipes and conductors theretofore laid in the various streets, highways and public places in the said City and County of New York by said predecessor companies and that it has not laid additional mains, pipe and conductors in said City and County of New York with the consent of the municipal authorities of said City.

III.

Denies that the said Consolidated Gas Company of New York has duly complied with all the requirements of the said several statutes referred to in the "III" paragraph or sub-division of said Bill of Complaint.

IV.

Admits the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "IV."

V.

Admits the allegations contained in the paragraph or subdivision of said Bill of Complaint numbered "V."

VI.

Admits that the defendant, The City of New York is — domestic municipal corporation organized and existing under the Laws of the State of New York and situated in the Southern District of New York, and that the said City of New York has for years last past been a customer of the said Consolidated Gas Company of New York, and that the amount of gas consumed by the said City during the year 1905, was nearly 400,000,000 cubic feet, and denies any knowledge or information sufficient to form a belief as to the other allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "VI."

98 VII.

Admits the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "VII."

VIII.

Admits that the order made by the Commission of Gas and Electricity of the State of New York on or about February 23, 1906, a copy of which is annexed to the Bill of Complaint marked Exhibit

"C," requires a reduction of twenty cents per thousand cubic feet from the price of one dollar per thousand cubic feet charged by the said Consolidated Gas Company of New York, pursuant to chapter 385 of the Laws of 1897, by which the maximum price of gas in The City of New York was fixed for the year 1901 and subsequently at $1 per 1,000 cubic feet, denies that said price of $1 per thousand cubic feet is a reasonable price; and denies any knowledge or information sufficient to form a belief as to the other allegations contained in the paragraph or subdivision of said Bill of Complaint numbered "VIII."

IX.

Admits the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "IX."

X.

Admits that the Consolidated Gas Company of New York was incorporated pursuant to chapter 367 of the Laws of 1884 of the State of New York, and refers to said statute for greater particularity; and alleges on information and belief that at the time of the commencement of this action the orator was not and never has been a corporation duly incorporated for the manufacture and sale of gas in the City and County of New York; and denies the other
99 allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "X."

XI.

Admits that the said Consolidated Gas Company of New York controls plants consisting of real estate, buildings, machinery, pipes and other apparatus in good order and repair, suitable and actually used for the purpose of manufacturing and distributing gas in the City and County of New York; and denies the other allegations contained in the paragraph or subdivision of said Bill of Complaint numbered "XI."

XII.

Admits that the price charged by the said Consolidated Gas Company of New York, has been gradually reduced from $2.25 per thousand cubic feet in 1884 to $1.00 per thousand cubic feet in 1901, and denies that "the said price of $1.00 per thousand cubic feet is relatively as low a price as the prices charged in any other city or town in the said State, or elsewhere in the eastern part of the United States, and is as low as business prudence would have justified your orator in adopting and charging," as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XII."

Denies any knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph or sub-division of said Bill of Complaint.

XIII.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XIII."

XIV.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-
100 division of said Bill of Complaint numbered "XIV."

XV.

Admits that "By chapter 737 of the Laws of 1905, hereinbefore referred to, it is provided that stock or bonds shall not be issued by any gas corporation until the Commission of Gas and Electricity shall certify in writing as to the amount of stock or bonds reasonably required for the purposes of the corporation," and denies any knowledge or information sufficient to form a belief as to the other allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XV."

XVI.

Admits that under and by virtue of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, the Consolidated Gas Company of New York is entitled to charge a price for its gas sufficient to cover the fair and reasonable cost of manufacturing and distributing the same, with a reasonable profit thereon; and denies all the other allegations contained in the paragraph or subdivision of said Bill of Complaint numbered "XVI."

XVII.

Admits that "By chapter 712 of the Laws of 1899, the State Board of Tax Commissioners was created, to determine the valuation of special franchises subject to assessment in each city, town or tax district, and refers to the said statute for greater particularity.

Denies any knowledge or information sufficient to form a belief as to the other allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XVII."

XVIII.

Denies that the actual and reasonable cost to the said Consolidated Gas Company of New York of manufacturing and dis-
101 tributing gas during the four years prior to 1905 averaged about 67 cents per 1,000 cubic feet.

Denies that the reasonable cost to the said Consolidated Gas Company of New York for manufacturing and distributing gas during the year 1906 "will be in excess of seventy cents per thousand cubic feet, such figures being due to the actual and reasonable cost to the said Gas Company of the coal, naphtha, pipe and other materials

necessary for the manufacturing and distribution of the said consolidated Gas Company of New York's gas, the cost of which has increased owing to the increase of the amount of taxes which must be paid by the said Gas Company and to the increase in the standard of illuminating power required by law," as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XVIII."

Denies any knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph or sub-division of said Bill of Complaint.

XIX.

Denies that "the reasonable profit upon the said investments to which your orator is entitled, and the enjoyment of which is guaranteed to it as hereinbefore stated by the Fourteenth Amendment to the Constitution of the United States, is at least ten per cent. per annum," as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XIX."

Denies that "a fair, just and reasonable price for gas in the said City at the date of the order of February 23, 1906, and at the present time, could not possibly be less than $1.00 per thousand cubic feet; that the said rate of 80 cents per thousand cubic, fixed by said Commission as aforesaid, will permit a profit of only 10 cents per
102 thousand cubic feet to your orator," as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XIX."

Denies the other allegations contained in the said paragraph or sub-division of said Bill of Complaint.

XX.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XX."

XXI.

Admits that the exhibit marked "E," annexed to the Bill of Complaint, is a true copy of the opinion or statement rendered by the said Commission in connection with its said order, as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XXI." and refers to the same for greater particularity.

Denies any knowledge or information sufficient to form a belief as to the other allegations contained in the paragraph or sub-division of said complaint numbered "XXI," except the allegation in words following:

"The price fixed in the said order of February 23, 1906, is not a just, fair or reasonable compensation for the use of your orator's property, or a just, fair or reasonable return for the services rendered by your orator, and the effect of the said order of February 23, 1906, will be to reduce the gross income of your orator below the actual and reasonable cost of manufacturing and distributing gas, including an allowance for depreciation of its plant and a fair profit

upon its capital stock or upon the property owned and used by it in its said business, to prevent your orator from fulfilling the purposes of its incorporation and from performing the duties
103 imposed upon it by the common law and by the statutes of this State hereinbefore referred to, and to compel your orator either to continue in said business without the fair profit to which it is entitled, or to abandon its business altogether and to sacrifice its said plants for a small fraction of their cost and present value,"

which allegation this defendant denies.

XXII.

Denies the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XXII."

XXIII.

Admits that the defendant, The City of New York, has brought actions against the Consolidated Gas Company of New York to recover the penalties prescribed by chapter 736 of the Laws of 1905 for violations of the provisions thereof in regard to pressure, and the amount which it claims to recover in the said actions already aggregates the sum of $46,000, and that it intends to bring other actions of the same nature against the said gas company.

Denies any knowledge or information sufficient to form a belief as to the other allegations contained the paragraph or sub-division of said Bill of Complaint numbered "XXIII."

XXIV.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XXIV."

104 XXV.

Denies that "the penalties provided in said acts and order would be unreasonable and confiscatory and would deprive your orator of its liberty of contract and of its property without due process of law and without just compensation, and would likewise deny to it the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States," as alleged in the paragraph or sub-division of said Bill of Complaint numbered "XXV."

Denies any knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph or sub-division of said Bill of Complaint.

XXVI.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-division of

said Bill of Complaint numbered "XXVI." Except that it admits the amount involved in this suit is more than $2,000.

XXVII.

Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or sub-division of said Bill of Complaint numbered "XXVII."

XXVIIa.

Denies each and every allegation in the Complaint contained not hereinbefore specifically admitted, controverted or denied.

XXVIII.

For a first separate and distinct defense to the Bill of Complaint of the said Consolidated Gas Company of New York, the defendant shows and alleges, on information and belief, that heretofore
105 and before the passage of the said acts, fixing the price of gas to The City of New York at seventy-five cents and to the inhabitants thereof at eighty cents, and the order made by the said Commission of Gas and Electricity, fixing the price of gas to the inhabitants of The City of New York at eighty cents, a fair and impartial investigation was made by and through the Legislature of the State of New York and the said Commission of Gas and Electricity into the business and affairs of the said Consolidated Gas Company for the purpose of ascertaining what was the actual cost to said Consolidated Gas Company of the manufacture and distribution of gas in the territory in which said Company was engaged in business and what was a fair and reasonable profit thereon. That full and ample opportunity was afforded said Company on each occasion to present all the facts it desired in connection therewith and said Company on each occasion availed itself of such opportunity so presented. That all the facts presented at said investigation by said Company were duly considered and that the actions taken by the Legislature and the said Commission, in view of these facts, thus ascertained, were just and reasonable and such as to enable the said Gas Company to maintain its existence, to preserve its property from destruction or confiscation and to receive on its capital actually and *bona fide* invested in its plants a fair and reasonable remuneration or dividend.

XXIX.

That full, fair and comprehensive examinations and investigations were made into the business and affairs of said Company under the Act of the Legislature of the State of New York passed in 1885, and again in 1886, and again in 1905, and by the said Commission of Gas and Electricity in the years of 1905 and 1906, and defendant prays leave to refer to and use the testimony offered on behalf
106 of said Gas Company and the reports made thereon as to the result of such investigations and examinations on the trial of this action.

That annexed hereto and made part of this answer is a copy of the report of the joint committee of the Senate and Assembly of the State of New York, dated Albany, N. Y., April 29, 1905. Senate D.

XXX.

Defendant further alleges that it is the largest consumer of gas supplied by said Consolidated Gas Company, and that by an examination made on behalf of the said defendant The City of New York of the books of the said Consolidated Gas Company and a true and correct inventory of all its plants and property, made by competent accountants and engineers—for permission to make which accounting, examination and inventory this defendant intends to apply to this Honorable Court—it will conclusively appear that the price of gas to The City of New York, fixed by statute at seventy-five cents per thousand cubic feet, is far more than sufficient to repay to the said *New York Mutual* Gas *Light* Company a fair and reasonable profit upon the cost of manufacture and distribution of gas to the said defendant The City of New York.

XXXI.

For a second separate and distinct defense the defendant shows and alleges, on information and belief, that said Consolidated Gas Company owns or controls every corporation, with one unimportant exception, to wit, The Bronx Gas & Electricity Company, engaged in manufacturing and supplying gas or electricity for illuminating purposes, or distributing the same in the Boroughs of Manhattan and The Bronx, in The City of New York, said gas and Electricity being commodities of common use for lighting and other purposes, and that said plaintiff corporation was formed for the purpose
107 of regulating and controlling and does regulate and control as a monopoly the price of gas and electricity in the Boroughs of Manhattan and The Bronx in The City of New York, and that said plaintiff was further organized to and does prevent competition in the manufacture, sale and distribution of gas and electricity for lighting and other purposes in said Boroughs of Manhattan and The Bronx, and said ownership and control by plaintiff of all the said other corporations, created and was for the purpose of creating, establishing and maintaining a monopoly within this State, to wit, in the Boroughs of Manhattan and The Bronx, in The City of New York, to control the prices, manufacture, production and sale of gas and electricity for lighting and other purposes in the said Boroughs of Manhattan and The Bronx, and such consolidation and control of said companies, was and is, by reason thereof, against public policy, illegal and void, and the agreement or agreements under which such consolidation of said companies has been effected are against public policy, illegal and void, under the provisions of chapter 690, Laws of 1899, of the State of New York.

That the said Consolidated Gas Company is a monopoly, and in consequence there is no standard or market price or value for either gas or electricity in the Boroughs of Manhattan and The Bronx, in The City of New York, and that the only manner in which such market value can be ascertained is through an examination and inspection of its books and an inventory of its property to determine the actual cost of production and distribution of the gas supplied by it, and adding thereto a sum sufficient to return a fair and reasonable profit upon the money actually invested in the business with due regard to the hazard involved.

XXXII.

That the plaintiff, as a public, or quasi-public, service corporation, was and is bound to furnish light and lighting service
108 to defendant, and is entitled to recover only the fair value of the same.

For a third separate and distinct defense the defendant shows and alleges on information and belief that at the time of the commencement of this action the plaintiff was not and never has been a corporation duly incorporated for the purpose of manufacture and sale of gas in the City and County of New York. And furthermore alleges that the New York Gas Light Company, the Manhattan Gas Light Company, the Metropolitan Gas Light Company of the City of New York, the Municipal Gas Light Company of the City of New York, the Knickerbocker Gas Light Company, and the Harlem Gas Light Company, were not corporations duly organized and existing under the laws of the State of New York, with powers, property and franchises as alleged in said paragraph "I." of the Bill of Complaint at, prior to or since the time of the consolidation as alleged in said paragraph "I." And defendant further alleges that said Consolidated Gas Company did not become the owner of the franchises or consents of its predecessor companies to lay, maintain and operate mains, pipes and conductors as alleged in paragraph "II." of the Bill of Complaint; that it does not become the owner or entitled to maintain and operate the mains, pipes and conductors theretofore laid by said predecessor companies, as alleged in said paragraph "II."; that it did not lay additional mains, pipes and conductors in The City of New York with the consent of the municipal authorities of said city, as alleged in said paragraph "II."

That the said Consolidated Gas Company of New York has not, as appears by its said Bill of Complaint, made out any title to the relief thereby prayed.

Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said
109 Bill of Complaint material to be answered, according to its best knowledge and belief, humbly prays this Honorable Court to enter its judgment that this defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as

to this Honorable Court may seem meet and in accordance with equity.

Dated New York, June —, 1906.

JOHN J. DELANY,
Corporation Counsel, Solicitor for the Defendant,
The City of New York.

Office and Post-office Address, No. 2 Tryon Row, New York City.

WILLIAM P. BURR,
Of Counsel.

STATE OF NEW YORK, *County of New York, ss:*

John J. Delany, Corporation Counsel of The City of New York, and an officer of the Defendant in the above-entitled action, being duly sworn, says: That the foregoing answer is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the Defendant is that it is a corporation; that this deponent is an officer of the same, to wit, Corporation Counsel, and that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Department of Finance, or of other depart-
110 ments of the City government, or from statements made to him by certain officers or agents of the Defendant.

JOHN J. DELANY,
Corporation Counsel.

Sworn to before me this 4th day of June, 1906.

THOMAS F. NOONAN,
Notary Public, New York County.

111 & 112 EXHIBIT "A."

Report of the Joint Committee of the Senate and Assembly of the State of New York.

April, 1905.

New York:
Martin B. Brown Company, Printers and Stationers,
Nos. 49 to 57 Park Place.
1905.

113 *Report of the Joint Committee of the Senate and Assembly of the State of New York.*

To the Senate and Assembly:

The Joint Committee of the Senate and Assembly appointed pursuant to Joint Resolution adopted March 16, 1905, submits the following report:

The Resolution directed the Committee "To proceed to investigate and examine into the organization and operation of the Gas and Electric Lighting Companies: the reasonableness of the charges maintained by the Gas and Electric Lighting Companies operating in The City of New York for services rendered the city and its inhabitants with reference to the cost of service and the actual capital employed therein: the condition in which the business of the companies is conducted with reference to competition: the quality of the service: the circumstances connected with the negotiation and execution of the city light contracts of 1904: and any other phase of the Gas and Electric Lighting business as they are conducted in The City of New York, deemed by the Committee to be germane to the purposes of such investigation"; and to report "the result of their investigation with such remedial measures as it may deem proper."

113*a* From the evidence taken by the Committee the following facts are deemed to be established:

Boroughs of Manhattan and Bronx.

The companies engaged in the manufacture and sale of gas, and in the production and sale of electric current for light, heat and power purposes, in these boroughs, are the following:

Gas Companies:

Consolidated Gas Company of New York.
The New York Mutual Gas Light Company.
The Standard Gas Light Company.
New Amsterdam Gas Company.
Central Union Gas Company.
Northern Union Gas Company.

Electric Companies:

The New York Edison Company.
The United Electric Light and Power Company.
The Brush Electric Illuminating Company.

Gas and Electric Companies:

Westchester Lighting Company.
Bronx Gas and Electric Company.

The following companies are engaged in the business of providing and maintaining conduits for electrical conductors in these boroughs:

Consolidated Telegraph and Electric Subway Company.
Empire City Subway Company.

The Consolidated Gas Company of New York controls all the other Gas and Electric Companies above mentioned, with the unimportant exception of the Bronx Gas and Electric Company. One of the companies so controlled, the New York Edison Company, owns the Consolidated Telegraph and Electrical Subway Company; it also has an interest in the Empire City Subway Company, whose

conduits, however, are mainly used for telegraph and telephone conductors.

113*b* Consolidated Gas Company of New York.

History:

The Consolidated Gas Company of New York has an authorized capital of $100,000,000, of which $80,000,000 have been issued. It was organized in November, 1884, under chapter 367 of the Laws of 1884, as a consolidation of the following six gas companies:

New York Gas Light Company, incorporated 1823.
Manhattan Gas Light Company, incorporated 1830.
Metropolitan Gas Light Company, incorporated 1848.
Harlem Gas Light Company, incorporated 1855.
Municipal Gas Light Company, incorporated 1874.
Knickerbocker Gas Light Company, incorporated 1876.

It was intended to embrace in the consolidation the New York Mutual Gas Light Company, the only other company then manufacturing and selling gas in the then City of New York, but this purpose was abandoned apparently on account of the provision of the charter of the Mutual Company, to which reference is hereafter made.

The authorized capital of the Consolidated Gas Company was, at the outset, $39,078,000, of which $35,430,060 was issued for acquisition of the properties and franchises of the constituent companies, subject to certain indebtedness. The remaining $3,647,940 was held in the treasury to provide for the payment of this indebtedness and for other purposes, and was subsequently issued.

In April, 1900, the capital stock was increased to $54,595,200.00 and the increased capital, $15,517,200.00, was used to retire debentures which had been issued for the purchase of the entire stock of the New York Gas and Electric Light, Heat and Power Company, amounting to $36,000,000 in par value. The shares of the New York Gas and Electric Light, Heat and Power Company, as will subsequently appear, were intrinsically worthless, and the evident purpose of their acquisition was to control the electric light industry represented by the merger of interests through which that company had been formed.

113*c* In 1901 the New York Edison Company was formed by the consolidation of the New York Gas and Electric Light, Heat and Power Company with the Edison Electric Illuminating Company, and its capital stock to the amount of $45,041,000, out of a total issue of $45,051,000 was taken by the Consolidated Gas Company in exchange for its shares of the New York Gas and Electric Light, Heat and Power Company, and stands upon its books at a valuation of $18,202,969.63.

In July, 1900, the capital stock of the Consolidated Gas Company was further increased to $80,000,000. Of the new shares, $3,773,600 in par value were issued to retire debentures made in the purchase of shares of the New Amsterdam Gas Company. Of the remaining ($21,631,200 in par value), $900,000 were sold at 193⅜, and the residue, $20,731,000 in par value, were sold to stockholders

at 150, the proceeds aggregating $32,837,175. These moneys were used in the purchase of securities of other companies and in the repayment of loans.

In July, 1904, authority was obtained for the increase of the capital stock to $100,000,000. The additional shares have not been issued, but 6 per cent. debentures have been issued and taken by the stockholders to the amount of $19,857,600, which are convertible into stock of the company at par at the option of the holder.

A portion of the moneys thus obtained was invested by the Consolidated Gas Company in certain securities, which it now owns, as follows:

17,632 shares of the stock out of a total of 34,366 issued shares of the New York Mutual Gas Light Company.

39,344 preferred shares out of a total of 42,957 preferred shares and 46,309 common shares out of a total of 49,857 common shares of the Standard Gas Light Company.

89,775 preferred shares out of a total of 90,000 preferred shares, and 121,095 common shares out of a total of 121,650 common shares of the New Amsterdam Gas Company.

Bonds of the Brush Electric Illuminating Company to the amount of $277,500, substantially all of the stock of that company being held by the United Electric Light and Power Company.

113*d* All the shares (500) of the National Coke and Coal Company, a corporation organized for the purpose of attending to its cartage and sales of coke.

16,398 preferred shares out of a total of 16,495 preferred shares and 36,086 common shares out of a total of 36,971 common shares of the United Electric Light and Power Company. It also holds the obligations of the United Electric Light and Power Company to the amount of $5,781,998.32 in par value.

All the capital stock (5,000 shares) of the Astoria Light, Heat and Power Company and its entire issue of bonds ($375,000) and also its notes for advances made in connection with the construction of a generating gas plant at Astoria, Long Island.

The entire capital stock of the Westchester Lighting Company (25,000 preferred, 100,000 common), which it acquired about July, 1904, by the assumption of the bonded indebtedness, principal and interest, of the New York and Westchester Lighting Company amounting to $12,500,000. It also holds certain obligations of this company.

The following is a statement of the amounts invested in these securities to December 31, 1904, according to the books of the Consolidated Gas Company:

New Amsterdam Gas Company, shares	$4,772,584 66
New York Mutual Gas Light Company, shares	5,328,227 80
Standard Gas Light Company, shares	14,123,519 10
New York Edison Company	18,202,969 63
United Electric Light and Power Company, shares	9,418,951 98
Brush Electric Illuminating Company, bonds	277,500 00
Astoria Light, Heat and Power Company, stock, bonds and notes	3,760,000 00
National Coke and Coal Company, shares	50,000 00
Westchester Lighting Company	4,895 00
Total (to December 31, 1904)	$55,938,648 17

113*e* The moneys realized from the convertible debentures issued in July, 1904, have not all been expended for corporate purposes, but to a large extent have been invested in Government and City bonds, as follows:

United States Government Bonds	$8,008,000 00
City of New York Corporate Stock	3,087,500 00
Total	$11,095,500 00

Large amounts have been loaned to the companies controlled by the Consolidated Gas Company, the loan to the New York Edison Company amounting to $3,000,000, of which $2,900,000 has been advanced since July, 1904.

The following is a comparative condensed balance sheet showing the assets and liabilities of the company as of December 31, 1904, and November 11, 1884, respectively, and the increases and decreases according to the books.

Assets.

	December 31, 1904.	November 11, 1884.	Increase.
Real estate, property, plant and construction	$47,402,617 53	$37,971,419 01	$9,431,198 52
Cash in banks in hand	1,391,137 41	.....	1,391,137 41
Accounts and bills receivable	18,223,995 26	824,865 86	17,399,129 40
Material and supplies	653,705 19	436,506 96	217,198 23
Securities, stocks and bonds	55,938,648 17	.....	55,938,648 17
Profit and loss	.....	62,441 36	*62,441 36
	$123,610,103 56	$39,295,233 19	$84,314,870 37

* Decrease.

113*f* *Liabilities.*

	December 31, 1904.	November 11, 1824.	Increase.
Capital stock	$80,000,000 00	$35,430,060 00	$44,569,940 00
" scrip	.....	920 00	*920 00
Bonded debt	1,394,000 00	1,836.507 53	*442,507 53
Convertible debentures	19,857,600 00	.....	19,857,600 00
Bonds and mortgages	15,000 00	38,676 67	*23,676 67
Consumers' deposits	835,482 86	301,162 02	534,320 84
Accounts and bills payable	3,997,997 70	1,687,906 87	2,310,090 73
Insurance fund, etc	304,153 93	.....	304,153 93
Capital stock premium	14,322,217 95	.....	14,322,217 95
Profit and loss	2.883,651 12	.....	2,883,651 12
	$123,610,103 56	$39,295,233 19	$84,314,870 37

The details of the investments and securities aggregating $55,-938,648.17 have already been given.

The details of the increases in accounts and bills receivable, amounting to $17,399,129.40, are as follows:

Sundry Consumers	$485,804 89	
Sundry Debtors	585,414 00	
Instalment Stove Sales	2,129 00	
Accounts Receivable—		
Branches	7,299 48	
East River Gas Company of Long Island City	496,511 11	
New York Edison Company	3,000,000 00	
U. S. Government Bonds	8,008,000 00	
City of New York Corporate Stock	3,087,500 00	
Accrued Interest, viz:		
113*g* New York City Corporate Stock	17,500 00	
New York Edison Company	41,124 99	
National City Bank	62,599 44	
Brush Electric Ill'g Co	27,500 00	
United Electric Light and Power Company	842,166 68	
General Suspense	735,579 81	
		$17,399,129 40

It thus appears that the total amount invested (to December 31, 1904), by the Consolidated Gas Company in securities of other companies controlled by it, including advances made to such companies, is $60,579,654.54, to wit:

Invested in securities, as shown by statement above.	$55,938,648 17
Advanced to East River Gas Company of Long Island City (controlled by New Amsterdam Gas Company)	496,511 11
Advanced to New York Edison Company	3,000,000 00
Advanced to United Electric Light and Power Company	842,166 68
Advanced to Westchester Lighting Company (included in item General Suspense, $735,579.81)	302,328 58
Total	$60,579,654 54

Gas Business:

Apart from the amounts invested in the securities of other companies, the balance of the "Real Estate, Plant, Property and Construction Accounts" as shown by the books of the Consolidated Gas Company on December 31, 1904, was $47,402,617.53. This was the book value at that date of the Real Estate and Plant used in its gas business, including apparatus, holders, mains, services, meters, gas stoves, and franchises, and rights.

113*h* The corresponding items of property on November 11, 1884, showed a book value of $37,971,419.01.

The total issues of stock of the six constituent companies and their indebtedness assumed by the Consolidated Gas Company were as follows:

	Stock.	Indebtedness assumed.
Manhattan Gas Light Company	$4,000,000 00	$590,724 08
New York Gas Light Company	4,000,000 00	131,741 76
Metropolitan Gas Light Company	2,500,000 00	825,763 46
Municipal Gas Light Company	3,000,000 00	402,410 33
Knickerbocker Gas Light Company	1,500,000 00	1,175,271 48
Harlem Gas Light Company	2,000,000 00	289,239 65
	$17,000,000 00	$3,415,150 76

The appraisal of the properties of the constituent companies for the purposes of consolidation was as follows:

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114	New York.	Manhattan.	Metro-politan.	Municipal.	Knicker-bocker.	Harlem.	Total.
Street mains, valves, etc..	$950,000	$1,083,000	$971,000	$749,000	$744,000	$720,000	$5,217,000
Meters	215,000	367,000	273,000	158,000	69,000	113,000	1,195,000
Services	127,000	350,000	233,000	103,000	81,000	111,000	1,005,000
Plant	2,874,000	3,623,000	2,044,000	1,804,000	980,000	826,000	12,151,000
Real estate	1,607,000	3,563,000	1,474,000	889,000	480,000	604,000	8,617,000
Bulkheads, piers and water rights	250,000	425,000	300,000	200,000	115,000	100,000	1,390,000
Office buildings	100,000	175,000	.....	.....	.....	50,000	325,000
Office furniture	15,000	20,000	12,000	16,000	2,000	5,000	70,000
Laboratories, photometer rooms, etc.	5,000	5,000	5,000	6,000	1,000	2,000	24,000
	$6,143,000	$9,611,000	$5,312,000	$3,952,000	$2,472,000	$2,531,000	$29,994,000
Rights, franchises, etc....	1,417,000	2,329,000	1,863,000	1,175,000	528,000	469,000	7,781,000
Totals.....	$7,560,000	$11,940,000	$7,175,000	$5,100,000	$3,000,000	$3,000,000	$37,775,000

115 This appraisal, as of June, 1884, was adjusted so as to cover additions up to November 11, 1884, amounting to $196,419.01, making the total of the property account of the latter date $37,971,419.01, as follows:

	As per schedule, June, 1884.	Additions to Nov. 11, 1884.	Total, Nov. 11, 1884.
Real estate	$10,332,000 00	.....	$10,332,000 00
Plant	12,175,000 00	$7,491 41	12,182,491 41
Mains	5,217,000 00	16,962 10	5,233,962 10
Services	1,005,000 00	29,241 41	1,034,241 41
Meters	1,195,000 00	36,753 98	1,231,753 98
Meter cocks and connections	.....	11,926 53	11,926 53
Pipes and specials	.....	88,398 43	88,398 43
Office furniture and fixtures	70,000 00	.....	70,000 00
Horses, wagons and harness	.....	1,115 00	1,115 00
Tools and implements	.....	3,273 70	3,273 70
Gas stoves	.....	1,256 45	1,256 45
Scows	.....		
	$29,994,000 00	$196,419 01	$30,190,419 01
Franchises and rights	7,781,000 00	.....	7,781,000 00
	$37,775,000 00	$196,419 01	$37,971,419 01

It appears from the evidence taken by the investigating committee appointed by the Senate by resolution adopted May 15, 1885, that the cost of the properties of the constituent companies as shown by their books, exclusive of franchises, was $20,942,632.85, as follows:

Cost of Property.

Manhattan	$4,872,999 49
New York	4,630,642 03
Metropolitan	5,292,175 35
Municipal	4,092,347 86
116 Knickerbocker	810,481 15
Harlem	1,243,986 97
	$20,942,632 85

But evidence was offered on behalf of the Company to the effect that the fair cost of the real estate and plant necessary to produce and deliver gas in The City of New York was about $1,000,000 for every million of feet produced and distributed daily. Upon this

basis the majority of the Committee concluded that a valuation of $29,994,000 was not too high. The majority report upon this point was as follows:

"The question for your committee to examine was, was this capitalization thus obtained more than the fair aggregate value of the property franchises and rights of the constituent companies at the time of the consolidation. The street mains, valves, meters, services, plant, office building, office furniture, laboratories appear to have been appraised at the value of what it would cost to reproduce them at the time of the consolidation, and there is no evidence that any of these items were appraised too high except the evidence of the expert, Mr. Yalden, who finds that they were valued higher than they appear to have been charged as costing in the company's books. As to the value of the real estate, bulkheads, piers and water rights there is a conflict of testimony. It is a difficult question to determine, owing to the various opinions of real estate dealers. It appears from the evidence given by the three presidents of the Equitable, Consolidated and Mutual Companies that it costs for real estate and everything necessary for a capacity to produce and deliver gas in The City of New York about $1,000,000 for every million of feet produced and distributed daily.

"The Consolidated Gas Company can now produce and deliver 28,000,000 cubic feet daily and having a large amount of plant not now in use by the additional expense of $1,000,000 it can produce and deliver thirty-three million feet per day. If the above basis is a correct one then the aggregate value of the real estate and plants of the several companies given at $29,994,000 is not too high."

(Senate Document (86) No. 47, page lxxvi.)

117 From this conclusion Senator John I. Gilbert dissented vigorously, saying, after an examination of the evidence in detail:

"Thus it is indisputable that upon the evidence the fair capital of the combined constituent companies, having regard to their actual and prospective capacities and present output of gas, should stand at less than twenty millions of dollars" (*Ibid.*, page 48).

To the valuation of $29,994,000 covering tangible properties there was added $7,781,000 for franchises and rights. As to this addition the majority of the committee said:

"There certainly seems to be a great injustice to the people in permitting the value of the franchise conferred by the State to form a basis of capitalization for the purpose of organization as a corporation and that the consumers of gas should be required to pay such a price for it as would pay a dividend upon the value of these franchises which are a gift to the people. But it is a fact that the laws of 1884, under which these companies consolidated, expressly authorized this to be done. * * * Thus the question for your committee to decide was this: Was $7,781,000 more than the fair aggregate value of the franchises and rights of these six companies? We are forced to the conclusion that it was not; that the franchises of the New York, Manhattan, Metropolitan and Municipal were worth more than that sum, and if these companies saw fit to give a

part of the value of their franchises to the stockholders of the Harlem and Knickerbocker it was matter that interested only the stockholders of those companies (*Ibid.* (77) lxxix).

As to this Senator Gilbert, in his dissenting opinion, said:

"One fictitious item of $7,781,000.

"With no limitation by law on the price of gas, or regulation as to its quality or measurement, the effect of adding arbitrarily $7,781,000, the last scheduled item, to the capitalization of six companies already capitalized excessively for the business they were conducting, is to tax gas consumers for an unrestricted profit on an apparent investment of $7,781,000, when in honest truth that $7,781,000 does not represent one dollar.

"Seven per cent. on this sum is over half a million dollars per annum. More than four times that amount has already been
118 distributed as dividends and collected by the consolidation from the gas-paying public of New York.

"This item alone of $7,781,000 is a significant badge. The public wrongs its approval would perpetuate justifies the Legislature in disintegrating the transaction of which it is an essential element" (*Ibid.*, page 46).

This item of $7,781,000 was described by Harrison E. Gawtry, former president of the Consolidated Gas Company, in his testimony before the State Board of Tax Commissioners, as representing the good will of the consolidated companies, the right to exist as a corporation, contracts with the City, etc., the right to make and sell gas and the right to occupy the streets.

The result of the consolidation was that the shareholders of the six companies capitalized the properties which, according to their books, had cost them $20,942,632.85, at $37,971,419.01, without any additional contribution.

Since 1884 the company has expended for replacements $4,663,838.32, and a corresponding amount has been written off for depreciation. There have also been added for betterments $9,431,198.52, which represents the net increase of the plant account according to the books. The actual book cost of the present plant thus appears to be $30,373,831.37, as follows:

Original cost as shown by the books of the constitutent companies (Senate Document (86) 47, page 776)	$20,942,632 85
Increase since 1884, as shown by company's books (Exhibit 387)	9,431,198 52
Total book cost	$30,373,831 37

As to the actual value of this property invested in the gas making business of the company we have its sworn statements to the State Board of Tax Commissioners as of June 30, 1904. Schedule D of this report shows the following assets as of said date:

119	Real Estate and Plant	$19,673,075 42
	Mains and Services	4,261,156 39
	Bonds and Obligations of other Companies	8,686,744 70
	Stocks of other Companies	46,674,034 27
	Material and Supplies	697,014 92
	Accounts and Bills Receivable	1,944,968 09
	Cash on Hand	1,146,866 87
	Unclaimed Dividends	39,052 50
	Metropolitan Fund	500 00
	Contracts, Rights, etc	7,781,000 00
	Meters, Stoves and other Personal Property	2,667,329 77
	Total	$93,571,742 93

Taking out the items of stocks, bonds and obligations of other companies, accounts and bills, receivable, cash on hand, unclaimed dividends and Metropolitan Fund, the remainder represents the value of the company's plant.

Real Estate and Plant	$19,673,075 42
Mains and Services	4,261,156 39
Material and Supplies	697,014 92
Meters, Stoves, etc	2,667,329 77
Contracts, Rights, etc	7,781,000 00
Total	$35,079,576 50

The secretary of the company testified that this was the value of the assets on the basis of cost of reproduction, allowing depreciation. It will be found by reference to Schedule K of the said report, verified by him, that the value of the assets was stated on the basis of the cost of reproduction without allowing depreciation save in the case of property in streets; to wit, mains and services. These mains and services were put at $4,261,156.39 as their present value, allowing depreciation, while their value on the basis of cost of reproduction without allowing depreciation was stated to be $5,613,221.12.

The following is a comparison of the items constituting plant as shown by the books and by the report to the State Board of Tax Commissioners, both as of June 30th, 1904 (Exhibit 390):

120	Book value.	Value as stated in report.	Difference.
Real estate	$11,216,479 71	$11,216,479 71	.....
Plant	15,755,462 88	8,456,595 71	$7,298,867 17
Mains	7,571,808 83	3,666,531 38*	3,905,277 45
Services	1,227,931 86	594,625 01*	633,306 85
Material and supplies.	697,014 92	697,014 92	.....
Meters, stoves and other personal property	3,630,772 12	2,667,329 77	963,442 35
Franchises and rights.	7,781,000 00	7,781,000 00	.....
Total	$47,880,470 32	$35,079,576 50	$12,790,893 82

If from the total value of plant as stated in the report to the State Board of Tax Commissioners the item of franchises and rights, $7,781,000, be deducted, there remains as the actual value on the basis of cost of reproduction without depreciation, except in the case of mains and services, $27,298,576.50, as follows:

Total Value of Plant as stated in Report	$35,079,576 50
Franchises and rights	7,781,000 00
Total Value of Tangible Properties	$27,298,576 50

There is no satisfactory evidence that the plant of the company is worth more than this amount, which may fairly be taken as its present actual value.

Good-will, Franchises, etc.:

The fact that the company, by rendering competition impossible, has been able to earn large dividends does not justify it in
121 adding to the value of its plant an additional amount for good-will or earning capacity and thereby justify a continuance of excessive charges. If this were permitted it would be able to secure in perpetuity the maintenance of exorbitant rates. Extortion for a series of years would be the sufficient excuse for further extortion. Indeed, there would seem to be no escape from the conclusion that successful imposition upon the public would warrant increased charges upon the ground of enhanced good-will. The company is entitled to a fair return upon its capital actually invested, but it is not entitled to capitalize its grip upon the public. The fact that it may be proper to value good-will due to efficient

*Stated in Tax Report under the heading "Present Value allowing for Depreciation." Reproduction value stated as $5,613,221.12 for mains and services made up as follows (detail not given in report):

Mains	$4,829,925 82
Services	783,295 30
Total	$5,613,221 12

organization and to the securing of public esteem through good service under ordinary conditions of competition furnishes no reason for an addition to capital in order to maintain high charges of an amount which, while termed good-will, is really an estimate of an earning capacity due to a monopolization of a public service. Upon the facts disclosed by the evidence the Consolidated Gas Company cannot properly claim the right to add to value of its plant upon the score of franchises and rights save as these may be deemed to represent actual property, to wit, rights in the streets duly acquired pursuant to law.

But it is doubtful whether the Consolidated Gas Company has any extensive rights in The City of New York. It appears that no franchise other than the franchise to be a corporation has been granted to the Consolidated Gas Company, and it would seem that several of the grants to the constituent companies have expired or will soon expire.

The grant to the New York Gas Light Company was made May 12, 1823, for thirty years. The grant to the Manhattan Gas Light Company was made May 5, 1848, for twenty years. The grant to the Metropolitan Gas Light Company was made December 22, 1858, for thirty years. The grant to the Municipal Gas Light Company under ordinance of December 23, 1876, apparently will expire in 1907. The grant to the Anthracite Gas Lighting and Heating Company, made September 17, 1863, and claimed by the Knickerbocker Gas Light Company, apparently will expire in 1913. The
122 grant to the Harlem Gas Light Company, which was incorporated in 1855 for a period of fifty years, was made April 25, 1855, and contained no time limitation. The City, however, reserved the right "to purchase at any time from the said company all the materials, pipes, fixtures, buildings and all and singular all the personal and real property owned by said company by paying to said company the cost of the same and ten per cent. over and above said cost." No evidence has been furnished of any other franchise granted to any other constituent company or claimed by the Consolidated Gas Company.

It is not the province of this committee to determine precisely to what extent the Consolidated Gas Company may possess rights in the streets. It is the duty of the municipal officers to take proper steps to prevent an unauthorized encroachment upon public property, and the matter is now under consideration by the Corporation Counsel.

Sufficient facts appear, however, to make it extremely doubtful whether the Consolidated Gas Company has any rights in the streets of considerable value. It has been urged upon the committee that the Senate Committee in 1886, long after several of the grants to constituent companies had lapsed, reported that the franchises of four of the companies were worth more than $7,781,000. It would seem, however, that the Senate Committee referred simply to the good-will of the constituent companies, based upon the large dividends they had previously declared, a matter as to which we have already expressed our opinion. Reliance is also placed upon the fact

that the State Board of Tax Commissioners has assessed the franchises of the Consolidated Gas Company at several millions of dollars. Not only has the Company resisted these assessments, upon the ground that they were without warrant of law, but it is obvious that the State Board of Tax Commissioners could not by their assessment create franchises, and the company has had it in its power by proper proceedings to review the assessments in the courts. For obvious reasons the company has not seen fit to challenge the assessments upon the ground that it had no rights in the streets or that its rights were not as extensive as its mains, and the assessments cannot
123 be regarded as evidence that the company possesses franchises of value, when the question of the fairness of the charges of the company, in relation to its actual investment, is under consideration. Taking into consideration the original cost of its properties, we have no reason to believe that the company has underestimated their value, and our conclusion, based upon the sworn statements of the officers of the company, is that the fair value of its gas-making plant, including whatever franchises it may own, does not exceed the sum of $30,000,000.

Income and Dividends:

The income of the Consolidated Gas Company from gas sales, securities owned, and miscellaneous sources (including rentals from gas stoves, interest on bank balances, etc.) for the years 1900 to 1904, inclusive, was as follows:

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	1900.	1901.	1902.	1903.	1904.
Gas sales	$8,167,710 82	$10,290,331 90	$11,499,438 88	$12,774,240 18	$13,167,609 70
Income from securities owned (less taxable applicable to same)	210,693 53	586,868 59	634,607 53	738,806 40	963,514 19
Miscellaneous income	215,509 64	76,483 16	100,165 33	109,905 47	119,717 55

125 With the exception of the years 1899 and 1900, the Consolidated Gas Company paid dividends at the rate of 8 per cent. per annum from 1894 until December, 1904, when a quarterly dividend was declared of 2½ per cent., or at the rate of 10 per cent. per annum. The dividends for the year 1899 were 5½ per cent. and in 1900 6 per cent. The following is a table of the capital outstanding and the rate of dividends paid for the years 1900 to 1904, inclusive:

Dividend dates.	Capital stock.	Rate. *Pr. ct.*	Dividend paid.
March 15, 1900	$39,077,900 00	1	$390,779 00
June 15, 1900	54,551,900 00	1	545,519 00
September 15, 1900	54,551,900 00	2	1,091,038 00
December 15, 1900	71,593,700 00	2	1,431,874 00
March 15, 1901	72,533,900 00	2	1,450,678 00
June 15, 1901	72,830,200 00	2	1,456,604 00
September 15, 1901	72,831,100 00	2	1,456,622 00
December 15, 1901	72,886,400 00	2	1,457,728 00
March 15, 1902	72,891,100 00	2	1,457,822 00

June 15, 1902.....	72,891,800 00	2	1,457,836 00
September 15, 1902.....	72,916,400 00	2	1,458,328 00
December 15, 1902.....	72,917,100 00	2	1,458,342 00
March 15, 1903.....	72,917,200 00	2	1,458,344 00
June 15, 1903.....	72,917,200 00	2	1,458,344 00
September 15, 1903.....	72,917,600 00	2	1,458,352 00
December 15, 1903.....	79,986,300 00	2	1,599,726 00
March 15, 1904.....	79,998,900 00	2	1,599,978 00
June 15, 1904.....	79,999,600 00	2	1,599,992 00
September 15, 1904.....	80,000,000 00	2	1,600,000 00
December 15, 1904.....	80,000,000 00	2½	2,000,000 00

126 In addition to these dividends the stockholders are receiving interest at the rate of 6 per cent. per annum upon $19,857,600 of debentures convertible into the stock of the company at par. It is apparent that these dividends and interest are paid for the most part out of the profits of the gas business. The income from securities owned is slight in comparison with the amount of capital invested in them. Upon a large proportion of the shares of other lighting companies owned by it the Consolidated Gas Company receives no return whatever. The investment in these securities serves the double purpose of preventing competition, on the one hand, and of so enlarging the capital stock, on the other hand, as to disguise in a lower rate of dividends the large amount of profits received from the business of making and selling gas.

Cost of Making Gas:

In the last few years the Consolidated Gas Company has purchased a considerable amount of the gas sold by it from the companies which it controls. The amount of gas made by the Consolidated Gas Company and manufactured for it by other companies in the years 1901 to 1904, inclusive, is as follows:

Gas Manufactured by Consolidated Gas Company.

1901.	1902.	1903.	1904.
9,696,461,000 c. f.	9,899,300,000 c. f.	9,911,434.000 c. f.	8,984,950,000 c. f.

Gas Manufactured for Consolidated Gas Company by New Amsterdam Gas Company.

1901.	1902.	1903.	1904.
672,991,538 c. f.	1,758,139,300 c. f.	2,794,598,600 c. f.	3,487,038,600 c. f.

127 *By Standard Gas Light Company.*

1901.	1902.	1903.	1904.
557.287,582 c. f.	561,049,017 c. f.	517,445,182 c. f.	675,853,790 c. f.

By Mutual Gas Light Company.

1901.	1902.	1903.	1904.
88,012,733 c. f.	135,795,500 c. f.	193,178,400 c. f.	738,324,300 c. f.

By Central Union Gas Company.

1901.	1902.	1903.	1904.
.....	.....	.....	27,258,300 c. f.

This gas was delivered to the Consolidated Gas Company either at its holders or in its mains. The price agreed to be paid therefor was the actual cost of the labor and material entering into its manufacture, plus 10 per cent. thereof for the service rendered. There was an exception to this in the case of the Mutual Gas Light Company in 1901, when the net price was fixed at fifty cents per thousand cubic feet. The rates paid upon this basis per thousand cubic feet of gas purchased were as follows:

Purchased from.	1901.	1902.	1903.	1904.	Average.
New Amsterdam Gas Company	33.17	38.03	34.74	32.88	34.54
Standard Gas Light Company.	35.18	33.82	33.96	32.36	33.51
Mutual Gas Light Company..	50.00	44.10	45.07	40.46	42.39
Central Union Gas Company..	.....	.....	.....	28.0	28.09
Total.....	35.15	37.18	35.19	33.92	35.07

128 The cost of the gas made by the Consolidated Gas Company at its holders during the years 1901 to 1904, inclusive, is, according to its books, as follows:

Year.	Quantity.	Cost out of holder.	Rate per 1,000 cu. ft.
1901.....	9,696,461 c. f.	$3,521,619 67	.363
1902.....	9,899,300 c. f.	3,445,229 12	.348
1903.....	9,911,434 c. f.	3,824,806 14	.386
1904.....	8,984,950 c. f.	3,528,901 55	.393
Total.....	38,492,145 c. f.	$14,320,556 48	Avg. .3725

The foregoing cost out of holder includes the actual cost of production, that is to say, labor and materials, and also covers repairs to apparatus, the buildings, and to tools and implements. Replacements of plant are also charged to the cost of production. The cost out of holder does not, however, include the expenses of distribution of the gas or any portion of the general administration.

It is noticeable that the Consolidated Gas Company bought gas cheaper than it made it. Its larger purchases were made from the New Amsterdam Gas Company. In the year 1904 the New Amsterdam Gas Company manufactured for the Consolidated Gas Company 3,487,038,600 cubic feet, or about one-quarter of the entire amount of the gas sold by the latter. The average price of this gas at cost and 10 per cent. was .3288 per 1,000 cubic feet, while the gas made by the Consolidated Gas Company during the same year was produced at a cost out of holder of .393.

Taking the cost of gas made and the cost of gas purchased by the Consolidated Gas Company the total average cost out of holder of all the gas manufactured and purchased is found to be as follows:

129 1901:

Gas Manufactured	9,696,461,000	cf. at	.363
Gas Purchased	1,318,291,673	cf. at	.363
Total	11,014,752,673	cf. Av.	.362

1902:

Gas Manufactured	9,899,300,000	cf. at	.348
Gas Purchased	2,454,983,817	cf. at	.372
Total	12,354,283,817	cf. Av.	.353

1903:

Gas Manufactured	9,911,434,000	cf. at	.386
Gas Purchased	3,505,222,182	cf. at	.35
Total	13,416,656,182	cf. Av.	.377

1904:

Gas Manufactured	8,984,950,000	cf. at	.393
Gas Purchased	4,928,474,990	cf. at	.339
Total	13,913,424,990	cf. Av.	.374

Cost of Distribution.

The following is the cost of distribution, amount of repairs to property, other than that used in manufacture, interest on consumers' deposits, bad debts, replacements of mains, meters, services, etc.:

Year.	Quantity (total mfd. and purchased.)	Cost of distribution.	Rate per 1,000 cf.
1901	$11,014,752,673 cf.	$1,408,258 38	.128
1902	12,354,283,817 cf.	1,605,554 04	.13
1903	13,416,656,182 cf.	1,547,994 59	.1154
1904	13,913,424,990 cf.	1 611,263 18	.1158

130 *General Expenses Not Embraced in Cost of Production and Distribution.*

These include general office expenses, advertising and legal expenses, insurance, taxes, etc., and are as follows:

Year.	Quantity.	Amount.	Rate.
1901	11,014,752,673 cf.	$950,032 28	.086
1902	12,054,283,817 cf.	1,032,691 05	.084
1903	13,416,656,182 cf.	1,272,085 41	.095
1904	13,913,424,990 cf.	1,224,467 07	.088

The foregoing does not include dividends, or interest on funded debt or outstanding debentures.

The total average cost, according to the books of the company, for the manufacture and purchase of gas for the years 1901 to 1904 inclusive is as follows:

Total Cost of Gas Manufactured and Purchased Per 1,000 *C. F.*

Year.	Cost of manufacture.	Cost of distribution.	General expense.	Total.
1901.....	.362	.128	.086	.576
1902.....	.352	.13	.084	.566
1903.....	.377	.115	.095	.587
1904.....	.374	.116	.088	.578
Average for four years	.366	.122	.082	.577

A portion of the gas manufactured and purchased was used by the company and a further portion is unaccounted for owing to losses in distribution, leakage, etc. The rate of cost based upon gas sales is therefore somewhat larger than the rate based upon gas production.

131 The gas sales in the years 1901 to 1904 inclusive were as follows:

Year.	Gas manufactured and purchased.	Gas used by company.	Gas unaccounted for.	Gas sold.
1901....	11,014,752,673 c. f.	70,055,963 c. f.	647,740,949 c. f.	10,296,955,761 c. f.
1902....	12,354,283,817 c. f.	60,460,556 c. f.	798,985,010 c. f.	11,494,838,251 c. f.
1903....	13,416,656,182 c. f.	61,923,306 c. f.	588,187,597 c. f.	12,766,545,279 c. f.
1904....	13,913,424,990 c. f.	64,914,306 c. f.	677,750,504 c. f.	13,170,760,180 c. f.

The following is the cost per thousand cubic feet upon the basis of gas actually sold:

Year.	Gas sold.	Total expenses, exclusive of interest.	Rate per 1,000 c. f.
1901.....	10,296,955,761 c. f.	$6,338,143 50	.6155
1902.....	11,494,838,251 c. f.	6,996,143 38	.6086
1903.....	12,766,545,279 c. f.	7,878,601 88	.6171
1904.....	13,170,760,180 c. f.	8,036,281 97	.6101

Future Plans:

The Consolidated Gas Company contemplates the abandonment of the generating stations in the Borough of Manhattan, and the substitution therefor of the new generating plant which it is now erecting at Astoria, L. I., through its subsidiary corporation, The Astoria Light, Heat and Power Company. The plant at Astoria is to have a total capacity of 40,000,000 cubic feet per day, or capable of producing a yearly average substantially equivalent to the production of the present plants in Manhattan. There have already

been expended for this purpose upwards of $3,000,000, represented by the obligations of the Astoria Company. The plant which will thus be replaced has a book value of approximately $10,000,000. It has been testified that the improvements in apparatus and the economies due to centralization will reduce the cost of gas out of holder to about twenty-nine cents per thousand cubic feet.

132 The New York Mutual Gas Light Company.

History:

This company was incorporated by chapter 651 of the Laws of 1866, with a capital stock of $500,000, which was subsequently increased to $3,500,000, of which $3,436,600 is outstanding.

Section VI. of the Act of Incorporation provided:

"In case the directors of the said corporation hereby created shall consolidate with or transfer the franchise hereby granted to any of the organized gas companies of The City of New York, the director or directors voting for such consolidation or transfer shall be deemed guilty of misdemeanor and upon conviction shall be punished by imprisonment in the penitentiary of said county for a period of not less than six nor more than twelve months."

This provision has been evaded by the purchase by the Consolidated Gas Company in the years 1899 to 1903 of a control of the corporation, that is to say, of a majority of its capital stock amounting in par value to $1,763,200, for which, as already stated, the Consolidated Gas Company paid $5,328,227.80.

The Mutual Company has no funded debt.

Properties:

The company has no interest in the securities of other corporations, and its real estate and manufacturing and distribution plant, at book value, according to the balance sheet of December 31, 1904, amounts to $3,350,522.71, to wit:

Real estate		$882,550 00
Bulkheads	$29,936 52	
Mains	433,893 09	
Services	153,551 46	
Meters	162,986 81	
Tools	8,474 81	
Office furniture	1,280 13	
Gas stoves	8,530 75	
Manufacturing plant	1,618,915 13	
		2,417,568 70
Material and supplies		50,404 01
		$3,350,522 71

133 The company has in the last two years expended out of accumulated earnings upwards of $800,000 for the improvement of its plant which was "worn out, out of date and had outlived its usefulness." And it is contemplated that an expenditure of about

$700,000 to $800,000 will be needed in order to complete the necessary improvements.

The amounts expended for betterments, and written off for depreciation, since 1894, are as follows:

Book value of plant and property Dec. 31st, 1894, as per bal. sheet		$2,094,040 84
Amounts expended on same:		
1895	$98,143 60	
1896	56,357 52	
1897	174,155 59	
1898	127,437 41	
1899	48,580 97	
1900	64,934 36	
1901	27,430 40	
1902	44,148 58	
1903	646,023 67	
1904	296,458 28	
		1,583,670 38
Meters and stoves condemned and lost	$57,810 33	
Holders taken down (8)	309,289 48	
Depreciation	893,042 71	
		1,260,142 52
Book value of plant and property Dec. 31, 1904		$2,417,568 70

Franchises:

On April 30, 1868, a grant was made to the company by the City of permission to "lay pipes for conducting gas through the streets, avenues, lanes, alleys and squares in said city for the period of thirty years." It does not appear that any other grant has been made to the company.

134 Income, Expenses and Dividends:

The Mutual Company sells gas to the Consolidated Gas Company and buys gas from that company, the accounts being adjusted in each case on the basis of cost of labor and materials plus ten per cent. for services. The Mutual Company also sells gas to the New Amsterdam Gas Company and to the Standard Gas Light Company at the rate of $1.00 per thousand cubic feet, permitting an offset of fifty cents for distribution and general services, the net sum received being fifty cents per thousand cubic feet.

The sales to the New Amsterdam Gas Company and the Standard Gas Light Company figure among the total sales of gas, while the sales to the Consolidated Gas Company are treated on the books as a credit on manufacturing account against the general cost of manufacture.

The total amount of gas sold, with the net proceeds realized, exclusive of sales to the Consolidated Gas Company, for the years 1900 to 1904 is as follows:

Year.	Gas sold.	Amount realized.
1900	1,336,778,125 c. f.	$1,105,698 11
1901	1,407,615,800 c. f.	1,361,355 33
1902	1,457,287,000 c. f.	1,445,129 53
1903	1,579,584,700 c. f.	1,559,889 74
1904	1,707,311,700 c. f.	1,680,611 15
	7,488,577,325 c. f.	$7,152,683 86

The company also has a small income from investments of surplus, sundry rentals, etc.

The expenses of the company for the years 1900 to 1904, after crediting the net amount received from the Consolidated Gas
135 Company, exclusive of reserves for depreciation and book value of property dismantled, are as follows:

Year.	Gas sales as above.	Expenses.	Cost per 1,000 c. f. of gas sold.
1900	1,336,778,125 c. f.	$826,205 58	.617
1901	1,407,615,800 c. f.	913,321 39	.648
1902	1,454,287,000 c. f.	1,004,181 92	.690
1903	1,579,584,700 c. f.	1,151,054 35	.728
1904	1,707,311,700 c. f.	1,083,549 65	.634

The following is a statement of the net earnings of the company from gas sales for the years 1900 to 1904, its reserves for depreciation, dividends and net surplus from such earnings as shown by its books:

Year.	Net earnings from gas sales.	Reserved for depreciation.	Rate of dividends.	Amount of dividends.	Net surplus from gas earnings.
1900	$317,211 58	.....	6 %	$210,000 00	$107,211 58
1901	485,137 22	$154,206 77	9 %	312,464 00	18,466 45
1902	484,779 39	146,375 90	9 %	309,294 00	29,109 39
1903	455,196 01	108,750 00	9 %	309,294 00	37,152 01
1904	678,358 53	350,630 56	9 %	309,294 00	18,433 97
	$2,420,682 73	$759,963 23		$1,450,346 00	$210,373 40

The total net book surplus on December 31, 1904, after deducting reserves for depreciation and paying dividends, amounted to $646,370.71.

Section IV. of the Act of Incorporation provides:

"Whenever the profits which shall be earned by said com-
136 pany after deducting all expenses and necessary outlays for labor and materials used in carrying on and extending the business of said company shall exceed in any one year the sum of ten per cent. upon the whole capital stock of said company, then, and in that event the excess over the said sum of ten per cent. shall be divided, the one-half of such excess between the consumers of the gas furnished by such company pro-rata according to the amount consumed by them respectively, and the other half shall be paid as a

dividend to such owners and holders of the stock of said company as may be consumers of the gas furnished by said company; provided that no individual holder or owner of said stock shall be entitled or shall receive, nor shall there be paid to him, such dividends upon more than fifty shares of such stock."

No such division as is contemplated by the statute has been made. It appears that the reserves for depreciation have not been fixed with reference to actual loss of value save in the case of certain dismantled holders in the year 1904, but that an amount has been set aside under the guise of reserve for depreciation when otherwise the net earnings of the company would have exceeded ten per cent. of the capital stock. When the earnings permitted a dividend of only six per cent. no such reserve was created. Such reserve has depended not upon the condition of the property but on the amount of profits, and when the latter has exceeded the statutory limit it has been the practice to pay dividends at the rate of nine per cent. and set aside a gross amount for depreciation which was then distributed among the various property accounts. In this way the intention of the act of incorporation has been defeated; the stockholders have received handsome dividends, and, in addition, the plant has been largely re-equipped out of earnings.

Standard Gas Light Company.

History:

This company was incorporated in the year 1886 with a capital of $500,000 which was subsequently increased to $10,000,000 of which there are now issued $9,295,700, consisting of $4,295,700 of preferred stock and $5,000,000 of common stock. $14,300 of common stock is in the treasury.

137 The funded debt of the company is $1,285,000.

By chapter 248 of the Laws of 1886, the company was authorized "to lay conductors and mains for conducting gas through and under all the streets, avenues and squares and public places" of The City of New York. The act then provided as follows:

"And as a consideration therefor the said company shall file in the office of the Comptroller of The City of New York a stipulation or agreement that all the gas supplied through such conductors and mains shall have illuminating power of 25 candles and that no greater price or charge for supplying the same shall be charged or received by said company or its successors, lessees, agents or assigns, than at the rate of $1.50 for each thousand feet of gas; provided, however, that said Standard Gas Light Company shall be subject to the provisions of any general law that may be passed regulating the price of gas in The City of New York. And that said company shall not consolidate or in any way unite with any other gas company in said city or in any way pool its earnings or receipts with any other company or organization organized for the distribution and sale of illuminating gas."

It was further provided that if the company after having filed said

stipulation should violate its terms it should be the duty of the Attorney-General to institute proceedings to forfeit its charter.

Pursuant to the act a stipulation was filed with the Comptroller of the City on August 6, 1886. The stipulation did not contain any provision as to consolidation or pooling of earnings.

As has been mentioned above the Consolidated Gas Company has acquired more than nine-tenths of the stock of the company, to wit: $3,934,400 of the preferred stock and $4,630,900 of the common stock in par value.

Properties:

The company has no interest in other companies.

The book value of its real estate, plant, property, franchise and material and supplies is stated in the balance sheet of January 1, 1905, as $10,558,350.30, to wit:

138	Real estate	$1,443,297 82
	Plant, Property and Franchises	9,047,794 82
	Material and Supplies	67,257 86

The item "Plant, Property and Franchise" ($9,047,794.62) is made up as follows:

Leases and Contracts	$3,795,007 50
Construction Works	1,668,691 93
Construction Street Mains	2,753,397 73
Construction Services	638,141 24
Gas Stoves	49,166 50
Meters	304,435 11
Tools	9,932 92
Cocks and Connections	6,218 44
Furniture and Fixtures	17,149 04
Horses and Carts	5,069 91
Badges	484 30
Service Carts	100 00
Total	$9,247,794 62
Less General Depreciation	200,000 00
	$9,047,794 62

It is not claimed that the item "leases and contracts" ($3,795,-007.50) represents any property whatever.

The street mains and services, carried in the books at $2,753,397.73 and $638,141.24, respectively, making a total of $3,391,538.97, are stated in the report of the company to the State Board of Tax Commissioners as of June 30, 1904, to be worth on the basis of cost of reproduction, new, $1,156,577.04, and allowing depreciation as worth $967,432.78. The book value of the plant, property and franchise therefore exceeds the actual value of the property by $3,028,680.93, to wit:

Plant, property and franchise, book value			$9,047,794 62
Deducted in plant account for depreciation			200,000 00
			$9,247,794 62
139 Leases and contracts non-existent, book value		$3,795,007 50	
Mains and services, book value	$3,391,538 97		
Present value on basis of reproduction, new	1,156,517 04	2,234,961 93	$6,029,969 43
Value of plant on basis of reproduction, new			$3,217,825 19
Deduct for depreciation in mains, as shown by report to State Board of Tax Commissioners (difference between $1,156,577.04 and $967,432.78)			189,144 26
Value of plant, allowing depreciation			$3,028,680 93

On this basis the value of the real estate, plant and material and supplies would be as follows:

Real estate (book value)	$1,443,297 82
Plant, allowing depreciation	3,028,680 93
Material and supplies	67,257 86
	$4,539,236 61

Franchises:

The company claims the right to open streets under the provision of chapter 248 of the Laws of 1886, above quoted.

Income, expenses and dividends:

The Standard Company sells gas to the Consolidated Gas Company on the basis of cost of labor and materials plus 10 per cent. for service and credits the amount received against the operating expenses, the gas sold not being included in the total gas sales as shown by its profit and loss account.

140 The total amount of gas sold, with the net proceeds realized, exclusive of sales to the Consolidated Gas Company, for the years 1900 to 1904, are as follows:

Year.	Gas sold.	Amount realized.
1900	1,757,858,421 c. f.	$1,435,036 27
1901	1,756,333,606 c. f.	1,706,998 60
1902	1,856,350,733 c. f.	1,838,906 54
1903	1,987,743,082 c. f.	1,962,158 29
1904	2,042,719,409 c. f.	2,011,126 20

The company receives an additional income of a small amount from rentals, interest, etc.

The expenses of the company for the years 1900 to 1904, after crediting the net amount received from the Consolidated Gas Company, exclusive of interest on funded debt and reserves for depreciation, are as follows:

Year.	Gas sales as above.	Expenses.	Cost per 1,000 c. f. of gas sold.
1900	1,757,858,421 c. f.	$968,570 22	.5516
1901	1,756,333,606 c. f.	939,636 31	.535
1902	1,856,350,733 c. f.	1,048,238 90	.561
1903	1,987,743,082 c. f.	1,044,317 63	.525
1904	2,042,719,409 c. f.	1,051,779 98	.514

The net earnings of the company for these years and its reserves for depreciation, dividends and net surplus are shown below:

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141 Year.	Net earnings from gas sales.	Interest on bonds.	Reserved for depreciation.	Rate of dividends. Preferred.	Rate of dividends. Common.	Amount of dividends.	Net surplus.
1900	$466,466 05	$68,100 00	$31,680 49	2½ per ct.	.....	$107,392 50	$259,293 06
1901	767,362 29	68,100 00	9,896 40	6 "	5 per ct.	507,027 00	182,338 89
1902	790,727 64	68,100 00	54,152 59	6 "	6 "	556,884 00	111,591 05
1903	917,840 66	68,100 00	220,590 04	6 "	6 "	556,884 00	72,266 52
1904	959,346 22	63,608 32	200,000 00	6 "	6 "	556,884 00	138,853 90

142 The total net book surplus on December 31, 1904, after deducting reserves for depreciation and paying dividends, amounted to $1,430,999.86.

New Amsterdam Gas Company.

History:

The New Amsterdam Gas Company was incorporated in 1898, being a consolidation of the following companies:

Equitable Gas Light Company of New York, incorporated in 1882.

New York and East River Gas Company, incorporated in 1893.

New Amsterdam Gas Company, incorporated in 1897.

The Equitable Gas Light Company had a capital stock of $4,000,000 and a funded debt of $3,500,000. It owned plant and mains in the then City of New York and operated under a permission to lay mains and pipes granted December 26, 1882, pursuant to ordinance of December 23, 1876. It was provided that the permission, unless sooner revoked for breach of condition, should continue for thirty years from its date and that the said permission should not be assigned or transferred without the consent of the Mayor, Comptroller and Commissioner of Public Works.

Paragraph 16 provided:

"16. The Equitable Gas Light Company, its successor or successors, shall not make or enter into any combination, arrangement or agreement with any other company or companies in regard to the amount of gas mains to be laid or to the streets in which mains are to be laid, nor in regard to the quantity of illuminating gas to be manufactured or the price for which gas is to be sold, exceeding the prices fixed in these conditions, and in the event of their so doing this permission shall *ipso facto* become null and void."

The New York and East River Gas Company had an authorized capital stock of $1,668,500 preferred and $5,000,000 common stock. Its bonded debt was $5,000,000. It had acquired the entire capital stock of the East River Gas Company of Long Island City, amounting to $1,000,000.

143 The East River Gas Company of Long Island City was incorporated in 1890, and by chapter 338 of the Laws of 1892 was authorized to supply gas and electricity in The City of New York, and for that purpose to lay and maintain conductors, mains and pipes under the streets of The City and also under the East river and across any intervening land belonging to The City of New York or to private persons. The corporation was given the right to "acquire by condemnation or purchase such real property, public or private, or right, interest or easement therein, for the laying and maintaining of its mains, pipes and conductors," as might be necessary in the exercise of the powers conferred. It was required to pay annually into the treasury of The City of New York three per cent. of its gross receipts "for gas furnished by it to private and public buildings in The City of New York through mains laid by it under the streets or avenues of said city." It was expressly

authorized "to supply gas and electricity to any other company or companies engaged in supplying gas or electricity in The City of New York."

Pursuant to this act the East River Gas Company of Long Island City built a tunnel under the East river and also under Blackwell's Island. It does not appear that it acquired any rights for the building of its tunnel either by condemnation proceedings or by agreement or purchase. It seems that certain mains were also laid in The City of New York and a plan for the production and distribution of gas was established in Long Island City.

The East River Gas Company of Long Island City conveyed to the New York and East River Gas Company its real estate and plant in Long Island City, reserving to itself, as it seems, simply its franchise, its mains and tunnel. The New York and East River Gas Company also received as a part of the transaction $1,300,000 in cash. It also acquired the stock of the Central Union Gas Company and 7,400 shares of the stock of the Northern Union Gas Company.

The original New Amsterdam Gas Company had not acquired any property prior to the consolidation.

The funded debt and capital stock of the consolidated company, the present New Amsterdam Company, is as follows:

144 Funded Debt of Constituent Companies, assumed:

New York and East River Gas Company bonds.....		$5,000,000
Equitable Gas Light Company, bonds.....		3,500,000
Equitable Gas Light Company, certificates of indebtedness		500,000
Equitable Gas Light Company, purchase money mortgage		100,000
Total.....		$9,100,000
Bonds, New Amsterdam Gas Company:		
Total issue	$11,000,000	
In treasury	365,000	
		10,635,000
Total funded debt.....		$19,735,000
Capital Stock:		
Preferred shares, $10,000,000 issued....	$9,000,000	
Common shares, $13,000,00 issued.....	12,165,000	
		$21,165,000
Total funded debt and capital stock outstanding.		$31,900,000

This capitalization is greatly in excess of the properties owned by the company. There are, apparently, no records available showing precisely the values of the constituent companies, but it certainly appears that these properties, together with later additions, furnish no adequate consideration for the securities which have been issued.

Included in the property acquired are the following shares of other companies:

New York Carbide and Acetylene Co., par value.....	$7,000,000
Central Union Gas Company, par value.....	3,500,000
Northern Union Gas Company, par value.....	740,000
East River Gas Co. of L. I. City, par value.....	1,000,000
Total par value.....	$12,240,000

145 The stock of the New York Carbide and Acetylene Company is apparently worthless, and it does not appear that it ever had any substantial value. The Central Union Gas Company and the Northern Union Gas Company have paid no dividends save a small dividend in the year 1902.

In its statement to the Department of Taxes and Assessments of the City of New York, made in March, 1904, for the purpose of revision of assessment, its property is stated as follows:

Total gross assets, including real estate.....		$26,138,500
Of above real estate other than franchise.	$3,464,000	
Of above value of franchise (as fixed by State Board of Tax Commissioners)...	4,732,000	
Of above value of personal property, not including good will	17,942,500	
		$26,138,500

In a similar statement made to the same department under date of March 9, 1905, the assets are stated as follows:

Total gross assets including real estate.....		$26,323,927
Of above real estate other than franchise.	$3,414,000	
Of above value of franchise (as fixed by State Board of Tax Commissioners)...	7,280,000	
Of above personal property.....	15,629,927	
		26,323,927

In each case the statement was made up in the following manner: From the total book value of the assets was deducted the amount of $15,000,000, arbitrarily stated as the value of the good-will, leaving as a balance in 1904 $26,138,560, and in 1905 $26,323,927. Of the amount stated as the value of personal property in each case, the sum of $12,240,000 is the par value of the shares of other companies. The difference in the total value of personal prop-
146 erty in the two statements of 1904 and 1905, is due to the increase of the assessment of franchises made by the State

Board of Tax Commissioners, it being the practice of the company to take the assessed value of the real estate and the assessed value of its franchise as fixed by the State Board and arbitrarily treat the remainder of its book assets as the value of its tangible personal property. It is evident that statements prepared in this way, in utter disregard of the obligations assumed in making them, furnish no trustworthy index to the value of the personal property.

We have, however, the total gross assets at book value, after deducting the arbitrary estimate of good-will, as $26,323,927 in January, 1905. If from this amount of assets there is deducted only the par value of the worthless stock of the New York Carbide and Acetylene Company ($7,000,000), there remains only $19,323,927, a sum less than the funded debt of the company. There is little reason to doubt that the property of the New Amsterdam Gas Company is worth very much less than this amount, and the conclusion is irresistible that its stock (held by the Consolidated Gas Company) represents no value whatever. No dividends have ever been paid.

Of these shares, $8,977,500 out of a total $9,000,000 par value of preferred shares issued and $12,109,500 out of a total in par value of $12,165,000 common shares issued are held by the Consolidated Gas Company:

Franchises:

The New Amsterdam Gas Company claims no franchises in the Boroughs of Manhattan and The Bronx other than that granted to the Equitable Gas Light Company for the term and upon the conditions above stated. It is a serious question whether, without the consent of the City authorities, the franchise of the latter company could be transferred by consolidation to the New Amsterdam Gas Company, but assuming the franchise to have been lawfully transferred, the further question is presented whether the present relations between the New Amsterdam Gas Company and the Con-
147 solidated Gas Company do not constitute a breach of the conditions of the franchise, rendering it subject to forfeiture.

The New Amsterdam Gas Company, however, controls the East River Gas Company of Long Island City, which still holds the franchise granted by the Act of 1892.

Since the consolidation it seems that no serious effort has been made to operate separately the mains in the Borough of Manhattan of the East River Gas Company of Long Island City, and the amount payable to The City of New York under the Act of 1892 has been arbitrarily determined by reference to a percentage of business bases upon conditions immediately prior to the consolidation. It seems that a recommendation of the Corporation Counsel, made some years ago, that an action should be brought for the purpose of ascertaining the amount justly payable to the City, has not been acted upon and no steps have been taken to ascertain whether the provisions of the Act of 1892 have been duly complied with. It may also be doubted whether, in the absence of condemnation proceedings or of due purchase of the easement, the East River Gas Company of Long Island City is entitled to maintain the tunnel under Blackwell's Island.

Income and Expenses:

Save for a small dividend on the shares of the Central Union Gas Company and Northern Union Gas Company, paid in 1902, the New Amsterdam Gas Company has received no income upon the securities it owns.

It sells gas as already mentioned to the Consolidated Gas Company, and the amount manufactured for the latter company in the years 1903 and 1904 largely exceeded the gas sold to consumers. The former does not appear among its gas sales, but the amount receiver therefor is credited against the expenses of its operations. The total amount of gas sold, with the net proceeds realized, exclusive of sales to the Consolidated Gas Company for the years 1900 to 1904, are as follows:

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Year.	Gas sold.	Amount realized.
1900	2,274,610,000 c. f.	$1,942,496 19
1901	2,239,588,200 c. f.	2,212,779 17
1902	2,440,251,000 c. f.	2,410,883 97
1903	2,657,495,000 c. f.	2,626,590 05
1904	2,772,251,700 c. f.	2,747,721 82

The expenses of the company for the years 1900 to 1904, after crediting the net amount received from the Consolidated Gas Company, exclusive of reserves for depreciation and interest upon funded debt, are as follows:

Year.	Gas sales as above.	Expenses.	Cost per 1,000 ft. of gas sold.
1900	2,274,610,000 c. f.	$1,497,109 36	.658
1901	2,239,588,200 c. f.	1,412,711 29	.630
1902	2,440,251,000 c. f.	1,396,107 82	.562
1903	2,657,495,000 c. f.	1,371,458 81	.506
1904	2,772,251,700 c. f.	1,387,043 98	.500

For the purposes of comparison it may be noted that the total amount of gas sold by the New Amsterdam Gas Company, including the amount manufactured for the Consolidated Gas Company in the year 1904, was 259,290,300 cubic feet, to wit:

Gas sold to consumers	2,772,251,700 c. f.
Gas manufactured for Consolidated Gas Co.	3,487,038,600 c. f.
Total	6,259,290,300 c. f.

The total cost of the production of this amount of gas to the point of distribution, that is to the point when the part
149 manufactured for the Consolidated Gas Company was taken by it, amounted (as stated by the company's vice-president in his testimony) to 32½ cents per 1,000 cubic feet.

The following is a statement of the net earnings of the company from gas sales for the years 1900 to 1904, its reserves for depreciation, and net surplus from such earnings as shown by its books:

Years.	Net earnings from gas sales.	Interest on funded debt.	Reserve for depreciation.	Net surplus from gas earnings.
1900	$445,386 83	$924,380 56	.....	Deficit $478,993 73
1901	800,037 88	954,416 35	.....	" 154,348 47
1902	1,014,776 15	971,812 00	.....	42,964 15
1903	1,255,131 24	939,289 71	.....	315,841 53
1904	1,360,677 84	830,092 28	$205,278 88	225,306 68

The balance sheet of December 31, 1904, showed a total net deficit in the operations of the company to that date of $953,496.06.

Central Union Gas Company.

History:

The Central Union Gas Company was organized in 1897 and operates in the Borough of The Bronx. It has a capital stock of $3,500,000, bonds outstanding, $3,500,000, and an additional funded debt of $62,000. All its capital, as mentioned above, is held by the New Amsterdam Gas Company.

Properties:

It owns 7,600 shares of the stock of the Northern Union Gas Company of the par value of $760,000, which it acquired by the issue of its bonds to the amount of $250,000.

The book value of its real estate and plant and its material and supplies on December 31, 1904, was as follows:

150	Plant, rights, franchises and good-will.....	$6,340,630 79
	Real Estate	187,217 07
	Construction	1,425,563 34
	Material and supplies.....	63,680 70
	Total.....	$8,027,091 90

The corresponding items of property appear in its balance sheet of December 31, 1903, at the book value of $7,778,375.75.

According to its sworn statement under date of March 10, 1904, presented to the Department of Taxes and Assessments of The City of New York, for the purpose of revising the assessment upon its property, its total gross assets amounted to $3,515,036.54. This included stock of other corporations $250,000, leaving as the stated value of the remainder $3,265,036.54. This amount was made up as follows:

Real estate other than franchises.....	$1,345,364 72
Franchises as fixed by State Board, 1903.....	1,450,000 00
Personal property	579,671 82
Total.....	$3,265,036 54

It may be concluded that the property of the company is worth less than the amount of its funded debt. No dividends have been paid upon its stock, save 2½ per cent. in the year 1902.

Franchises:

The only franchises claimed by the company are grants made by certain officers of the towns of Morrisania and West Farms, respectively, to Robert Campbell & Co. of the privilege to lay pipes under the streets of said towns. Each grant provided as follows: "This privilege to be exclusive to them for the term of twenty years from the date hereof, and said pipes may be extended from time to time during said term."

The Central Union Gas Company claims under assignment, although the grants were not in terms assignable, and apart from this, it appears that the franchises have expired by limitation.

151 In its petition, verified April 17, 1901, to the State Board of Tax Commissioners the company stated as follows:

"That the said Central Union Gas Company does not now possess any franchise or right to open the streets of The City of New York for the laying of its pipes and mains and enjoys no special privilege whatsoever in that behalf." This statement was repeated in a similar petition in 1902.

Income and Expenses:

The Central Union Company manufactures gas for the Northern Union Gas Company and the Consolidated Gas Company, receiving cost and ten per cent. additional for services.

The total amount of gas sold and the net proceeds realized, exclusive of sales to these companies, is as follows:

Year.	Gas sold.	Amount realized.
1900	584,794,200 c. f.	$610,926 70
1901	699,240,600 c. f.	719,173 54
1902	847,683,600 c. f.	867,065 04
1903	950,364,800 c. f.	969,608 78
1904	1,010,119,700 c. f.	1,024,237 68

The expenses of the company for the years 1900 to 1904, after crediting the net amount received from gas manufactured for other companies, exclusive of interest on bonded debt and reserves for depreciation, are as follows:

Year.	Gas sales as above.	Expenses.	Cost per 1,000 c. f. of gas sold.
1900	584,794,200 c. f.	$315,192 03	.538
1901	699,240,600 c. f.	403,876 08	.577
1902	847,683,600 c. f.	444,766 24	.524
1903	950,364,800 c. f.	489,819 26	.515
1904	1,010,119,700 c. f.	485,054 73	.480

152 The following is a statement of the net earnings of the company from gas sales for these years, its reserve for depreciation, dividends and net surplus from such earning as shown by its books:

Year.	Net earnings from gas sales.	Interest on bonds.	Reserve for depreciation.	Rate of dividends.	Amount of dividends.	Net surplus from gas earnings.
1900..	$295,734 67	$168,850 00	.....	....	.....	$126,884 67
1901..	315,297 46	163,985 96	$3,971 98	....	.....	147,339 52
1902..	422,298 80	166,138 89	4,760 71	2½%	$87,500 00	163,899 20
1903..	479,789 52	172,500 00	1,025 88	....	.....	302,263 64
1904..	539,182 95	172,500 00	151,739 20	....	.....	214,843 75

Northern Union Gas Company.

History:

The Northern Union Gas Company was organized in 1897 and also operates in the Borough of The Bronx. It has a capital of $1,500,000 and a funded debt of $1,250,000. A majority of its stock is owned by the Central Union Gas Company, and the remainder by the New Amsterdam Gas Company.

Properties:

On December 31, 1904, its balance sheet showed the amount of its real estate, plant, material and supplies at book value to be as follows:

Franchise and property	$2,608,629 22
Street lamps	150,999 33
Construction	485,626 45
Stoves and supplies	7,989 62
Total	$3,253,245 22

As in the case of the New Amsterdam Gas Company and the Central Gas Company, no records are in existence furnishing satisfactory evidence of the original cost of the properties included
153 in the franchise and property account. But the corresponding items of property appear in its balance sheet of December 31, 1903, at the book value of $3,041,483.89. And in March, 1904, the company presented a sworn statement to the Department of Taxes and Assessments of the City of New York, giving its total gross assets as worth $1,356,313.76, made up as follows:

Real Estate other than franchise	$576,428 49
Value of franchise	575,000 00
Personal property	204,885 27
	$1,356,313 76

Franchises:

In its petition to the State Board of Tax Commissioners, verified April 17, 1900, the company stated in the same language as that

used by the Central Union Gas Company that it did not "possess any franchise or right to open streets of The City of New York for the laying of its pipes and mains" and enjoyed "no special privilege whatsoever in that behalf."

In 1902 the Central Union Gas Company attempted to assign to the Northern Union Gas Company the franchise claimed to have been acquired by it under the grant to Robert Campbell & Co., in 1859, already mentioned, so far as it related "to that portion of the former town of West Farms now included in the Twenty-fourth Ward of the Borough of The Bronx." There would seem to be no basis for any claim on the part of the Northern Union Gas Company by virtue of this assignment.

It may also be claimed that certain franchises were acquired in 1902 through the merger with the Northern Union Gas Company of the Wakefield Gas Light Company and the Williamsbridge Gas and Electric Light Company for so much of the city as lies within the old towns of East Chester, South Mt. Vernon and Williamsbridge. There is no satisfactory evidence before us as to the performance of the conditions upon which these franchises were granted or as to the right of the Northern Union Gas Company to operate under them.

154 Income and Expenses:

The Northern Union Gas Company buys a considerable amount of gas from the Central Union Gas Company, and the amount paid on the basis of cost and ten per cent. figures in its expense account.

The total amount of gas sold, with the net proceeds realized, for the years 1900 to 1904, is as follows:

Year.	Gas sold.	Amount realized.
1900	197,135,000 c. f.	$238,303 76
1901	238,611,100 c. f.	272,220 35
1902	296,908,400 c. f.	319,666 33
1903	363,501,800 c. f.	398,081 07
1904	371,504,900 c. f.	397,050 68

The expenses of the company for these years, after deducting the amount paid for gas received from the Central Union Gas Company, exclusive of interest on bonds and reserves for depreciation, are as follows:

Year.	Gas sales as above.	Expenses.	Cost per thousand c. f. of gas sold.
1900	197,135,000 c. f.	$150,647 52	.764
1901	238,611,100 c. f.	172,065 27	.725
1902	296,908,400 c. f.	187,090 37	.630
1903	363,501,800 c. f.	240,284 35	.661
1904	371,504,900 c. f.	225,951 16	.608

The following is a statement of the net earnings of the company from gas sales for the years 1900 to 1904, its interest on bonds, re-

serve for depreciation, dividends and net surplus from net earnings as shown by its books:

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Year.	Net earnings from gas sales.	Interest on bonds	Reserve for depreciation.	Rate of dividends.	Amount of dividends.	Net surplus from gas earnings.
1900	$87,656 24	$62,500	.....	...	.....	$25,156 24
1901	99,155 08	62,500	.....	...	.....	36,655 08
1902	132,575 96	62,500	$3,050 80	4%	$60,000	7,025 16
1903	150,796 72	62,500	3,499 12	...	.....	84,797 60
1904	171,099 52	62,500	53,503 37	...	.....	55,096 15

Electric Companies.

New York Edison Company.

History:

The New York Edison Company was formed in May, 1901, by the consolidation of the Edison Electrict Illuminating Company and the New York Gas and Electric Light, Heat and Power Company.

Edison Electric Illuminating Company:

This company was organized under chapter 512 of the Laws of 1879. In 1900 there were merged with it the Harlem Lighting Company and the Manhattan Electric Light Company. It has a capital stock of $9,200,000 and a funded debt of $6,500,000.

New York Gas and Electric Light, Heat and Power Company (called The Power Company):

This corporation was formed in 1898. It acquired the following securities of the companies named:

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Companies.	Stock, par value.	Bonds, par value.	Coupons unpaid.
Mount Morris Electric Light Company	$1,500,000 00	.....	.....
North River Electric Light and Power Company	400,000 00	$100,000 00	.....
N. Y. Heat, Light and Power Company.	375,000 00	170,000 00	.....
Borough of Manhattan Electric Company.	100,000 00	.....	.....
Consolidated Telegraph and Electrical Subway Company,	1,521,200 00	4,225,000 00	$884,000 00
Block Lighting and Power Company, No. 1	98,000 00	.....	.....
Manhattan Lighting Company	250,000 00	250,000 00	.....
Yonkers Electric Light and Power Company	190,100 00	200,000 00	60,000 00
Totals	$4,434,300 00	$4,945,000 00	$944,000 00

It also acquired all but a few shares of the stock of the Edison Electric Illuminating Company and executed a purchase money mortgage in payment therefor (covering also the other property of the mortgagor), securing an issue of 4 per cent. bonds to the amount of $21,000,000, at a rate of $220 a share for the entire 92,000 shares of the Edison Electric Illuminating Company. By this mortgage it

was provided that the sum of $4,000,000 should be deposited with the Trustee to be used exclusively in extensions or betterments of the property of the Edison Electric Illuminating Company.

The Power Company also acquired a piece of real estate at Ninety-seventh street and First avenue, New York City.

For the purpose of acquiring these properties the Power Company, in addition to the bonds above mentioned, issue bonds to the amount of $7,500,000 and its entire capital stock $36,000,000 in par value. The bonds of $7,500,000 were secured by a mortgage for $15,000,000, which constituted a first lien upon all the property of the company except the shares of the Edison Electric Illuminating Company. Of the remaining bonds under this mortgage $4,000,000 were issued in order to raise the moneys required to be deposited in accordance with the terms of the purchase money mortgage for $21,000,000. The remainder of the $15,000,000 bonds secured by the general mortgage ($3,500,000) were held in the treasury.

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In addition to the bonds purchased by the Power Company, there remained outstanding liens upon the properties of the companies whose stocks were thus acquired, as follows:

Edison Electric Illuminating Company	$6,500,000 00
Mount Morris Electric Light Company	988,000 00
Real Estate Mortgages	315,000 00
Total	$7,803,000 00

The total funded debt and capital stock of the Power Company thus amounted to $76,232,883.80, as follows:

Capital Stock		$36,000,000 00
First General Mortgage Bonds ($15,000,000), issued for purchase of securities	$7,500,000 00	
First General Mortgage Bonds ($15,000,000), issued for betterments of Edison properties	4,000,000 00	
		11,500,000 00
Purchase Money Mortgage ($21,000,000)		20,929,883 80
Outstanding liens on properties of companies whose stocks had been acquired		7,803,000 00
Total		$76,232,883 80

In 1900 all the companies whose stocks had been acquired, save only the Consolidated Telegraph and Electrical Subway Company, the Yonkers Electric Light and Power Company and the Edison Electric Illuminating Company, were merged with the Power Company. The stocks of these companies were thus canceled and the title to the properties formerly represented thereby were vested in the Power Company.

Then followed in 1901 the consolidation of the Edison Electric

Illuminating Company with the Power Company, under the
158 name of the New York Edison Company. This Company was capitalized at $45,200,000, the aggregate amount of the capital stocks of the two constituent companies, but the value of the stock of the Edison Company was already represented in the stock of the Power Company, the latter having acquired practically all the shares of the former, that is to say, 91,681 out of 92,000 shares. No additional property was acquired through the consolidation, and there was no justification for this addition of $9,200,000 to an already grossly inflated capital.

The capital stock and funded debt of the New York Edison Company upon its formation was—

Capital Stock ($45,200,000), issued	$45,051,000 00
Funded debt and real estate mortgages	40,232,883 80
Total	$85,283,883 80

The assets of the New York Edison Company (exclusive of good will), represented by its capital stock and funded debt, amounted at book value to $34,819,368.60. They are thus stated by the auditor of the company (Exhibit 188):

Physical Assets in New York Edison Plant and Property Account, May 1, 1901.

License, Edison		$3,159,000 00
Edison Plants		15,259,162 77
Power Co. Plants	$5,260,027 21	
Less Credits	13,832 69	
		5,246,194 52
Real Estate 97 st		100,000 00
Subway Stk. & Bonds		5,746,200 00
Ykrs " "		1,390,100 00
Furniture & Fixtures Power Co		2,009 25
Construction, Bronx		95,186 42
Investment		2,191,017 61
Gen'l Fixtures		1,007 50
C. Trust Co., Trustee G. F		584,881 77
		$32,774,759 84
159 Excess Currents, Assets over Current Liabilities		2,044,608 76
		$34,819,368 60

The item "license Edison $3,159,000" covers licenses under patents most if not all of which have expired, and whatever value it now represents is apparently speculative and is incident to the existence of favorable contracts for the purchase of supplies and the continued use of the name of Edison.

The item "Edison Plants, $15,259,162.77" included in the plant of the Harlem Lighting Company which had been destroyed by fire, save certain overhead conductors subsequently removed by the City, and also covered the property of the Manhattan Electric Light Company which was carried on the books at a value largely in excess of its replacement cost. The statement that was submitted to the Referee in the certiorari proceeding to review the franchise assessment in 1901 showed the production value (without allowing depreciation) of the real estate and plant of the Edison Illuminating Company as of June 30, 1900, to be $6,025,647.27 as against the book value of the same items of $9,068,634.03, the excess of the book value being $3,042,986.76.

The item "Power Company Plants $5,246,194.52" was the net book value of the plants as they stood upon the books of the five companies which were subsequently merged with the Power Company, as above stated, as follows:

Manhattan Lighting Company	$500,865 35
New York Heat, Light and Power Company	695,000 00
North River Electric Light and Power Co	1,068,284 36
Borough of Manhattan Electric Company	259,138 56
Mt. Morris Electric Light Company	2,736,738 94
	$5,260,027 21
Less credits	13,832 69
	$5,246,194 52

160 Included in the book value of the property of the Mt. Morris Electric Light Company was $1,100,000 for patents evidently worthless.

The item in the plant and property account New York Edison, May 1, 1901 (above), "subway stock and bonds $5,746,200," includes $4,225,000 of the bonds and debentures and $1,521,200 of the stock of the Consolidated Telegraph and Electrical Subway Company. This company has never paid dividends, and the interest on its bonds is largely in arrears. Its stock is worthless and was plainly acquired for the purpose of monopoly control. The bonds are also worth much less than par.

It seems that $1,674,000 were bonds secured by a first mortgage originally issued for construction at 90, and $1,511,000 were second mortgage bonds originally issued at 60. Apparently the entire lot, with the debentures, was purchased by the syndicate which formed the Power Company at 60, and there is no evidence that they were worth more.

The item "Investment, $2,191,017.61," covers mainly the shares of the Edison Light and Installation Company and the stock and bonds of the Empire City Subway Company. The Edison Light and Installation Company was a company organized by the Edison Electric Illuminating Company to serve as an agency for the construction of the subways of the Empire City Subway Company occupied by the conductors of the Edison Company. The Edison Illuminat-

ing Company received the securities issued in payment for such construction, and owned the entire stock of the Edison Light and Installation Company, amounting to $1,216,400 in par value, which forms part of the item aforesaid. This stock is without value and the corporation is a mere dummy used by the Edison Company in connection with its work in the construction of subways.

The item "Central Trust Company, Trustee, G. F. $584,381.77" refers to the unexpended balance of the $4,000,000 of bonds, the proceeds of which were to be expended in betterments of the property of the Edison Electric Illuminating Company in accordance with the terms of the purchase money mortgage under which the stock of that company was acquired by the Power Company.

161 To make a proper estimate of the value of the assets of the New York Edison Company, exclusive of good will at the time of its formation, it would seem that the following deductions should be made:

Total book value of assets May 1, 1901, as above...		$34,819,368 60
Deduct—		
License Edison	$3,159,000 00	
Difference between book value and reproduction value of inside properties of Edison Electric Illuminating Company	3,042,986 76	
Patents Mount Morris Electric Light Company	1,100,000 00	
Stock Consolidated Telegraph and Electrical Subway Company....	1,521,200 00	
Bonds, same company, excess over 60 per cent. of par value.....	1,690,000 00	
Stock Edison Light and Installation Company	1,216,400 00	
		11,729,586 76
Leaving as the value of the property.....		$23,089,781 84

The testimony is that since its organization the plant, property and investments of the New York Edison Company were increased, to December 31, 1904, to the extent of $11,270,123.89, making the present value of its property, without allowing for depreciation, $34,359,905.73, as follows:

Value May 1, 1901.....	$23,089,781 84
Increase	11,270,123 89
Total, December 31, 1904.....	$34,359,905 73

Of the increase $2,021,194.44 is represented by subway securities.

162 In other words, exclusive of alleged good-will and franchises, the property of the New York Edison Company upon any reasonable valuation appears to be worth much less than the amount of its funded debt.

Franchises:

The New York Edison Company claims perpetual franchises under various grants made to its constituent companies of the right to lay and maintain conductors in the streets.

Control of Company:

It will be remembered that the Consolidated Gas Company had acquired the entire stock of the Power Company ($36,000,000), first issuing debentures therefor, which were returned by the issue of $15,517,200 in par value of its own capital stock. Upon the consolidation forming the New York Edison Company the stock of the Power Company was exchanged for the stock of the new company at the rate of 1.25111 per share. The Consolidated Gas Company now owns $45,041,000, or all but 100 shares of the issued stock. No dividends have been paid upon this stock and it is impossible to assign to it any substantial value.

Income and Expenses:

The net profits of the business after payment of interest on the funded debt, for the past five years have amounted to $10,521,302.04. All the repairs necessary to maintain the plant in the highest degree of efficiency have been charged to operating expenses. The net profits for each year, after payment of the funded debt, are as follows:

Year.	Net Profits.
1900	$904,005 89
1901	1,245,560 56
1902	2,298,966 80
1903	2,611,611 84
1904	3,460,856 95
	$10,521,302 04

163 Cost and Profit:

The average cost of producing and distributing current, including all necessary repairs, for the past five years has been 4.500 cents per kilowatt hour. The cost has gradually decreased from 5.053 cents per kilowatt hour in 1900 to 3.664 cents in 1904. The income, cost and net earnings per kilowatt hour on current sold for each year is given in the following table:

Year.	Income.	Cost.	Net earnings.
1900	9.694 cents.	5.053 cents.	4.641 cents.
1901	9.505 "	4.858 "	4.647 "
1902	9.211 "	4.703 "	4.508 "
1903	8.636 "	4.223 "	4.413 "
1904	8.042 "	3.664 "	4.378 "
Average	9.017 cents.	4.500 cents.	4.517 cents.

The amounts paid out of earnings for interest upon funded debt and the net surplus per kilowatt hour are as follows:

Year.	Net earnings.	Interest on funded debt.	Net surplus.
1900	4.641 cents.	3.47 cents.	1.171 cents.
1901	4.647 "	2.89 "	1.757 "
1902	4.508 "	2.39 "	2.118 "
1903	4.413 "	2.00 "	2.413 "
1904	4.378 "	1.663 "	2.715 "
Average	4.517 cents.	2.4826 cents.	2.035 cents.

Charges for Current:

The New York Edison has several schedules of rates, a retail schedule, two wholesale schedules, a special schedule and a separate schedule exclusively for power.

164 Of the total amount received for current sold in the Borough of Manhattan in 1904 ($8,991,635) approximately 49 per cent., or $4,371,046.54 was received under the retail schedule. This schedule provides for a rate of fifteen cents per kilowatt hour for first and second hours' average daily use of equipment, and a reduced rate for additional hours' use. The rate for the first and second hours' use, however, is based upon a scheduled capacity of the consumption of the lights installed, and the rate is not lowered until the consumption has reached the equivalent of two hours' use of all such lights. It may also be observed that it would be necessary for the consumer to use all his lights for seven hours each in order to have an average rate of ten cents per kilowatt hour under this schedule. The average amount paid under the retail schedule in the Borough of Manhattan in 1904 was 12.27 per kilowatt hour.

The two wholesale schedules provide for lower rates upon an agreed minimum monthly consumption of 2,000 and 2,500 kilowatt hours respectively, with an average daily use of not less than two hours. The maximum wholesale rate upon this basis is ten cents per kilowatt hour, with lower rates and discounts for increased consumption.

The special wholesale rate on the basis of an agreed monthly use of not less than 10,000 kilowatt hours is five cents per kilowatt hour for the first 15,000 K. W. H. and lower rates for increased consumption, reaching as low as three cents for excess over 50,000 K. W. H. It is further provided that suitable space shall be furnished without rental charge for such service and converting apparatus as the com-

pany may consider for the installation. It may be proper to say that the low rates maintained under the special wholesale schedule serve the purpose of meeting the demands of consumers who otherwise might install private plants.

Current for power is also furnished under the schedules above mentioned, the separate schedule for power exclusively having a maximum rate of ten cents per horse power hour, with a sliding scale of discounts according to consumption, the highest discount being fifty per cent. on monthly bills for 1,500 horse power hours and over.

165 We have already noted that the average rate paid for all current supplied by the Company in 1904 was 8.042 per kilowatt hour, against an actual cost of 3.664, which covered all the expenses of the company in producing and distributing the current, all necessary repairs, all general expenses and all outlays whatever except the payment of interest upon the funded debt.

The United Electric Light and Power Company.

History:

This company was formerly the New York Safety Electric Light and Power Company, and in 1889 its name was changed to the United Electric Light and Power Company. Its capital stock is $1,649,500 par value preferred shares, and $3,697,100 par value common shares, making a total of $5,346,600. It has a funded debt of $4,838,000. More than nine-tenths of the stock and almost all the bonds of the Company are held by the Consolidated Gas Company.

Properties:

The United Electric Light and Power Company owns 9,940 shares of the Brush Electric Illuminating Company, 2,000 shares of the Consolidated Telegraph and Electrical Subway Company, five $1,000 bonds of the New York Gas, Electric Light, Heat and Power Company, and other securities, making a total in book value of $1,052,600.75.

As the shares of the Brush Electric Illuminating Company and of the Consolidated Telegraph and Electrical Subway Company are worthless, the actual value represented by this item is less than $10,000. The book value of its plant account, December 31, 1904, is $10,197,900.36, made up as follows:

Patents, licenses and rights	$6,069,422 94
General construction	2,417,805 57
Machinery and fixtures	1,197,319 22
Real estate and buildings	548,486 78
Office furniture	7,301 59
166 Tools	10,915 31
Automobiles	21,648 95
Total	$10,272,900 36
Less depreciation	75,000 00
	$10,197,900 36

Of the first items "Patents, Licenses and Rights" $3,500,000 represents discount on bonds sold and expenses of reorganization, and the remainder represents alleged patent rights, franchises, etc.

The actual value of the properties of the Company may be gathered from the statement made by it to the Department of Taxes and Assessments of The City of New York under date of March 1, 1905, of which the total gross assets are stated to be of the value of $5,065,172.85. The items composing this valuation, as testified to by the treasurer of the Company, who verified the statement, are as follows:

Dec. 31, 1904:

General construction		$2,417,805 57
Machinery and fixtures		1,197,319 22
Office furniture		7,301 59
Tools		10,915 31
Automobiles		21,648 95
		$3,654,990 64
Allow 25 per cent		913,747 66
		$2,741,242 98
Add, Real estate and buildings		548,486 78
Stock of other companies		1,047,744 50
Brush Elec. Ill. Company		358,110 40
Insurance ind.		4,856 25
Accounts receivable	$254,529 68	
Cash	59,163 66	
Materials and supplies	51,038 60	
		364,731 94
		$5,065,172 85

167 This statement includes at least $1,040,000 as the value of stocks of other companies which are in fact worthless, and a valuation of the plant and property of the Company, exclusive of franchise and good will, at the sum of $4,000,000.

The Company claims to hold a franchise granted to it under its former name, the New York Safety Electric Light and Power Company, and also under franchise granted to the United States Illuminating Company, a corporation merged with it in 1902.

Income and Expenses:

The rates of Charges are the same as those of the New York Edison Company. The gross earnings are relatively small, averaging approximately $1,000,000 yearly. The earnings and total expenses, including depreciation charged off upon the books, but not including interest upon the funded debt, per kilowatt hour sold, are as follows:

Year.	Gross earnings per K. W. hour.	Cost per K. W. hour sold.	Net earnings.
1900	9.49 cents.	9.00 cents.	.49 cents.
1901	9.33 "	6.36 "	2.97 "
1902	9.24 "	6.12 "	3.12 "
1903	9.48 "	5.64 "	3.84 "
1904	9.45 "	6.24 "	3.21 "

The net earnings and the interest upon the funded debt per kilowatt hour sold are:

Year.	Net earnings per K. W. hour.	Interest on funded debt.		Net surplus.
1900	.49 cents.	3.20 cents.	Deficit,	2.71 cents.
1901	2.97 "	2.80 "	Surplus,	.17 "
1902	3.12 "	2.58 "	"	.54 "
1903	4.84 "	2.39 "	"	.145 "
1904	3.21 "	2.27 "	"	.94 "

168 Brush Electric Illuminating Company.

History:

This company was organized in 1881. It has a capital stock of $1,000,000 and a funded debt of $275,000. Substantially all its stock is held by the United Electric Light and Power Company, and its bonds are owned by the Consolidated Gas Company.

Properties:

The book value of its real estate and plant, December 31, 1904, was $1,437,534.97.

In its report to the Department of Taxes and Assessments, dated March 1, 1905, its total gross assets, exclusive of franchise, were stated to be $808,126.96, made up of real estate $147,824.96 and personal property $660,302.10.

Against these assets is owed, as appears by the same statement:

Accounts payable	$455,436 21
First Mortgage Bonds	275,000 00
Total	$730,436 21

Franchises:

It claims a direct franchise to lay and maintain conductors granted in 1881.

Income, Expenses, etc.:

Its income in 1904 was $121,470.44 and its expenses, including interest on bonds and the item of $25,000 for depreciation, amounted to $113,049.71.

It has paid no dividends and its interest has been in arrears since 1902.

The company is not now operating its own plant, but the New York Edison Company is supplying the customers of the Brush Company under an operating agreement. The plant of the Brush Company has been abandoned and most of its apparatus and machinery sold. The conductors have been withdrawn from the ducts and most of them have been disposed of as scrap.

169 Gas and Electric Companies.

Westchester Lighting Company:

This company, whose entire capital stock has recently been acquired by the Consolidated Gas Company in the manner already stated, operates chiefly in Westchester County, having only a small business in the northern part of the City of New York.

Bronx Gas and Electric Company:

This company was organized in the year 1893 and claims franchises in that section of the Borough of The Bronx lying east of the Bronx river, formerly the old Town of Westchester. Its issued capital stock is $270,500 and its funded debt amounts to $495,000.

Its property is as follows:

Real estate	$210,950 00
Personal property	131,575 24
Total	$342,525 70

Its business is comparatively small and its gas and electric departments are operated under one management. Its gross electric receipts for the past two years average about 8.3 cents per kilowatt hour and it sells gas at the rate of $1.15 per thousand cubic feet. It pays its bond interest and its dividends were at the rate of 5 per cent. in 1903 and 6 per cent. in 1904.

Subway Companies.

Consolidated Telegraph and Electrical Subway Company.

By chapter 534 of the Laws of 1884 provision was made for the placing of electrical conductors under ground, and by chapter 499 of the Laws of 1885, as amended by chapter 503 of the Laws of 1886, authority was given for the appointment of Boards of Commissioners in cities to which the Act applied, who should be charged with the responsibility of its enforcement.

The Consolidated Telegraph and Electrical Subway Company was incorporated in 1885, and on July 22, 1886, entered into a
170 contract with the Commissioners appointed in the City of New York, which was supplemented by a further contract dated April 7, 1887. The company undertook to build and maintain such subways as might be required for electrical conductors and to furnish the capital necessary for the purpose, not less than $3,000,-

000. The construction of the subways was to be made under the supervision of the Commissioners, and the rentals were to be subject to their control. Apt clauses were inserted to insure fair and equal treatment to all companies requiring space in the subways. The City of New York was permitted to use such space as it might need for its electrical conductors free of charge. The contract of April 7, 1887, further provided:

"VI. Whenever the net annual profits of the party of the second part remaining after the payment of the expenses of maintaining and operating such subways shall exceed ten per cent. upon the actual cash capital invested by it in providing, constructing and equipping such subways, then the excess of such profit over the ten per cent. shall be paid into the treasury of the City of New York; but if in any year or years prior to the earning of such excess the earnings of the party of the second part shall not have equalled ten per cent., then the party of the second part shall be first entitled to recoup itself out of such excess for the difference between the actual annual earnings and the said ten per cent., the intention hereof being that no payment shall be made to the City of New York out of such excess of earnings until the party of the second part shall first have actually earned and received ten per cent. for each year thereafter."

The company further agreed to keep accurate books of account open to the inspection of the Commissioners and their successors and of the Comptroller of the City, showing the amount of space in the subways occupied, the number and kind of electrical conductors therein, with the names of the owners, the gross and net amount in detail of rentals and all payments of every kind made by the company, specifying in detail and separately to whom each payment was made, "so that it may be determined whether the same is chargeable to the cost of construction or of maintenance."

171 In case of a substantial failure by the company to carry out the provisions of their agreement and an adjudication to this effect by a competent judicial authority, it was provided that the City should be entitled to enter into possession of the subways and that the company, "subject to any valid mortgages or liens then thereon outstanding not exceeding 50 per cent. of the actual cost of such subways and all leases or contract then existing for the use thereof as hereinbefore provided," should forfeit its interest in such subways and should peaceably surrender the same to the City (Par. XII.).

The agreement also contemplated the acquisition of all or any of the subways by the City and of all or any of the contracts or other property of the company, "subject, however, to all leases, mortgages or contracts heretofore lawfully made within the limitations imposed by section 12 of this contract." Upon the demand of the Commissioners of the Sinking Fund and on payment of not less than the cost thereof, or in case the company had not earned ten per cent. per annum on actual cost, on the payment of a sum in addition to the cost not exceeding ten per cent. thereof to the extent of such deficiency in annual earnings.

Pursuant to chapter 716 of the Laws of 1887, the Board of Elec-

trical Control succeeded the Board of Commissioners of Electrical Subways in the City of New York, and the agreements made between the Consolidated Telegraph and Electrical Subway Company and the Commissioners were duly confirmed.

Both the letter and the spirit of these contracts have been violated by the Consolidated Telegraph and Electrical Subway Company.

Instead of securing the necessary capital and constructing subways itself, it entered into contracts for their construction with the Phœnix Construction Company, a corporation to which it was closely allied.

The Phœnix Construction Company agreed to construct 800 miles of duct for $2,500,000, or, at the option of the company, at cost and fifteen per cent. additional. It proceeded with the work of
172 construction until 1891, building upwards of 900 miles of high tension and low tension ducts, and upon final settlement was paid in stock and bonds of the subway company. First mortgage bonds to the amount of $2,375,000 were taken by the construction company at ninety per cent., and second mortgage bonds to the amount of $2,375,000 at sixty per cent. The discount on the bonds, amounting to $1,187,500, together with the fifteen per cent. profit of the construction company, were treated as a part of the cost of construction and so reported to the Comptroller.

For the stock of the subway company only $40,000 was received in cash, $732,500 being issued for patents, and $1,102,500 as a part of the payment made to the Phœnix Construction Company.

By chapter 231 of the Laws of 1891, the Board of Electrical Control was authorized, with the consent of the Consolidated Telegraph and Electrical Subway Company, to enter into new contracts with the said company and with the Empire City Subway Company, Limited, providing for the division of the work of constructing and maintaining subways so that the Consolidated Subway Company should retain and proceed with the construction and maintenance of subways for high tension conductors; and the Empire City Subway should take over and proceed with the construction and maintenance of subways for low tension conductors. Accordingly on May 15, 1891, contracts were entered into between the Board of Electrical Control and the subway companies respectively providing for such division.

In taking over the low tension subways the Empire City Subway Company assumed the payment of $2,500,000 of the bonds of the Consolidated Subway Company which had been issued to the Phœnix Construction Company, the proportion of discount upon the bonds being treated as a part of the cost of the construction of these subways.

The total cost of construction of all the subways to December 31, 1890, was reported to the Comptroller as amounting to $8,317,795.74, of which there was credited by transfer to the Empire City Subway Company, $3,675,633.25, leaving as the reported cost of the high tension subways retained by the Consolidated Sub-
173 way Company, $4,660,162.40. This amount not only included the loss on bonds issued at less than par and the fif-

teen per cent. profit of the Phœnix Construction Company, and interest on deferred payments, but also apparently included the profits of sub-contractors by which the work was actually done.

On March 26, 1891, the Consolidated Subway Company entered into a contract with the Empire City Subway Company for the construction of high tension subways for the former on a basis of cost and fifteen per cent.

The Empire Subway Company worked under this contract for a little over a year and was paid in bonds in the same manner as the Phœnix Company, that is to say, in first mortgage bonds at ninety per cent. and in second mortgage bonds at sixty per cent. of their par value, the discount being treated as a part of the cost of construction. In July, 1892, the Empire Subway Company assigned its contract for the construction of high tension subways to the Union Subway Construction Company, which built subways for the Consolidated Subway Company until 1898, receiving its compensation in debentures at par of the Consolidated Subway Company.

In 1899 the New York Gas and Electric Light, Heat and Power Company purchased the greater part of the stock and $4,225,000 of the bonds and debentures of the Consolidated Subway Company, with unpaid coupons attached, thus acquiring absolute control at the same time that it secured the ownership of the various electric light and power companies in the boroughs of Manhattan and The Bronx, the absolute control of the high tension subway system.

Since that time the Power Company and its successor, the New York Edison Company, have supplied the moneys for the construction of additional subways, receiving therefor the debentures of the Consolidated Subway Company.

The company claims to have constructed, to the end of the year 1904, 1,452 miles of duct, exclusive of those transferred to the Empire City Subway Company, at a cost of $8,980,418.35.

The accounts of the company have not been kept in the manner required by its contract with the City. The books do not
174 show the actual cost of construction within the meaning of the contract, nor have proper statements been furnished to the Comptroller. The cost per mile as given by the company in different years exhibits extraordinary variations; and the testimony taken by the Committee has revealed many discrepancies in the various statements of cost which have not been satisfactorily explained. Certain statements have been made to the Comptroller professing to give the actual cost of construction which do not in fact state such cost, and were apparently prepared with the deliberate intention of inducing the belief on the part of the municipal officers that there had been an actual cash outlay, which in fact had not been made. The transactions of the company show an utter disregard of its obligations.

Rentals have been charged at the rate of $1,000 per mile, per annum, for three-inch ducts. It would seem that no attention has been paid to the requirement of the contract, that the excess of earning over ten per cent. of the *actual cash capital invested* by the company in providing, equipping and constructing such subways

should be paid to the City. The rights of the City in this respect can only be determined through a judicial accounting. A suit brought by the City is now pending for the purpose of obtaining such an accounting, and also to have the rights of the subway company declared forfeited by the reason of its failure to perform its contract.

It may be added that the intention of the act providing for the construction and operation of the subways, and the purpose of the contract, has to a large extent been defeated by the passing of the subways, constructed by this company, into the absolute control of a monopoly embracing the entire lighting industry of the Boroughs of Manhattan and The Bronx.

Pending the acquisition of the subways by the City, which is most desirable, the situation calls for the most effective supervision of the operations of the company.

Empire City Subway Company:

The Empire City Subway Company was organized in 1890, and pursuant to contract of May 15, 1891, took over, in the manner already explained, the low tension ducts built by the Consolidated Subway Company. Its contract contained similar provisions to the contract with the Consolidated Company, for the keeping of proper accounts, for the payment to the City of earnings in excess of ten per cent. of the actual cash capital invested, for forfeiture in case of breach of contract, and for purchase by the City at its option. Since that time it has constructed and maintained such low tension ducts as have been required. They are used for telegraph and telephone conductors and for the low tension conductors of the New York Edison Company.

The Edison Electric Illuminating Company originally built such ducts as it required for the Empire City Subway Company, through the medium of the Edison Light and Power Installation Company, and this practice has been continued by its successor, the New York Edison Company, to some extent, although it appears that at present the new low tension ducts required by that company are built by the Consolidated Subway Company. The low tension ducts which were built by the Edison Electric Illuminating Company and its successor for the Empire City Subway Company have been paid for in bonds and stock of the Empire Company, and the New York Edison Company now holds $493,000 of the bonds of the Empire Company and 5,120 shares of its stock. Upon these it receives interest and dividends.

About ten years ago an agreement was made between the Empire Company and the Edison Electric Illuminating Company, by which the latter undertook to maintain the ducts used by it for the sum of $200 per mile of duct per year. This arrangement has been continued and is now in force with the New York Edison Company. This payment under ordinary conditions is very largely in excess of the amount required to be expended for maintenance, and the New York Edison Company charges, as a part of its expenses for maintenance, the cost of conductors replaced. Through this method,

and by the interest and dividends it received upon the bonds and stock issued in payment for construction, the New York Edison Company secures in effect an offset to a large extent against the
176 rentals paid for the use of the Empire subways. The result is that the net amount that it pays is substantially equivalent to the interest upon the investment it would have made if it had built and owned its own subways.

Suit has also been brought by the City against the Empire City Subway Company for an accounting, in order to determine the amounts due to the City, and also to enforce the provision for forfeiture on the ground of breach of its contract obligations.

Boroughs of Brooklyn, Queens and Richmond.

The gas and electric companies in these boroughs are:

The Brooklyn Union Gas Company,

Controlling—

The Woodhaven Gas Light Company,
The Flatbush Gas Company,
The Newtown Gas Company,
The Richmond Hill and Queens County Gas Light Company, and
The Jamaica Gas Light Company.

The East River Gas Company of Long Island City,

Controlled by—

New Amsterdam Gas Company (above).

The Kings County Electric Light and Power Company,

Controlling—

The Edison Electric Illuminating Company of Brooklyn.

The Kings County Lighting Company.
The Brooklyn Borough Gas Company.
The Newtown and Flushing Gas Company.
The Queens Borough Gas and Electric Company.
The New York and Queens Electric Light and Power Company.
The New York and Richmond Gas Company.
The Richmond Light and Railroad Company.

177 Brooklyn Union Gas Company.

This company was organized in 1895; it has a capital of $15,000,000, first mortgage bonds $15,000,000 and six per cent. convertible debentures $3,000,000.

Upon its organization it acquired by purchase, subject to existing mortgages, all the properties of the following companies previously engaged in the business of making and selling gas in the city of Brooklyn, to wit

Brooklyn Gas Light Company,
Fulton Municipal Gas Company,
Metropolitan Gas Light Company,
Citizens Gas Company,
Williamsburgh Gas Light Company,
Peoples Gas Light Company, and
Nassau Gas Light Company.

The combined capital stock of these companies was $9,970,000, and their outstanding bonds amounted to $3,900,000. By the terms of purchase, the Brooklyn Union Gas Company reserved $3,900,000 of its bonds to retire the outstanding bonds of the original companies and $500,000 more of its bonds for betterments, and issued its remaining bonds, to wit, $10,600,000, and its capital stock, $15,000,000, making an aggregate of $25,600,000 for the properties represented by stocks of the par value of $9,970,000.

The stock and bonds of the original companies and the distribution of the stock and bonds of the Brooklyn Union Gas Company are shown in the following table:

Name.	Shares, par value.	Outstanding bonds, par value.	Brooklyn Union Company securities issued in payment.		Brooklyn Union Company bonds reserved.	
			Stock.	Bonds.	To retire outstanding bonds.	For betterments.
Brooklyn Gas Light Company	$2,000,000 00	.....	$1,950,000 00	$1,885,000 00	.....	$65,000 00
Citizens Gas Company	1,750,000 00	$1,250,000 00	1,500,000 00	200,000 00	$1,250,000 00	50,000 00
Fulton Municipal Gas Company ...	2,100,000 00	300,000 00	2,850,000 00	2,455,000 00	300,000 00	95,000 00
Metropolitan Gas Light Company ..	870,000 00	250,000 00	1,500,000 00	1,200,000 00	250,000 00	50,000 00
Nassau Gas Light Company	1,250,000 00	600,000 00	3,150,000 00	2,445,000 00	500,000 00	105,000 00
Peoples Gas Light Company	1,000,000 00	500,000 00	900,000 00	370,000 00	500,000 00	30,000 00
Williamsburgh Gas Light Company ..	1,000,000 00	1,000,000 00	3,150,000 00	2,045,000 00	1,000,000 00	105,000 00
	$9,900,000 00	$3,900,000 00	$15,000,000 00	$10,600,000 00	$3,900,000 00	$500,000 00

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179 The books were opened under the supervision of a bookkeeper (since deceased), an employee of the Consolidated Gas Company, and an exact comparison between the new entries and the valuations on the books of the constituent companies is not obtainable. But the evidence shows that the book values of the properties acquired were largely increased. For example, there were added between $4,000,000 and $5,000,000 to the book value of the street mains for rights in the streets, about $5,000,000 for goodwill, and an additional $3,050,000 for the rights of the constituent companies to "make and sell gas," or an aggregate increase in valuation of about $13,000,000. There is the additional fact that the mains and services were old and had greatly depreciated. It is evident that the capital stock of the Brooklyn Union Gas Company to a very large extent, to say the least, did not represent value.

Franchises:

The Brooklyn Union Gas Company claims the right to lay and maintain mains in streets under grants made to the original companies. Many of these grants applied only to particular districts. Although the transfers made by the companies to the Brooklyn Union Gas Company in 1895 purported to convey all their franchises and rights, many of these were not in terms assignable, and it is a serious question to what extent the Brooklyn Union Gas Company is lawfully exercising rights in the streets of the borough. It is evident that the matter should at an early date be made a subject of judicial inquiry upon proper action taken by the municipal authorities.

Stocks and Bonds of Other Companies:

The Brooklyn Union Gas Company has acquired the entire capital stock and certain bonds of the companies named below, which are carried upon the books of the Brooklyn Union Gas Company at the following amounts:

	Book Value.
200 shares Woodhaven Gas Light Company.....	$20,000 00
4,000 shares Flatbush Gas Company.....	372,771 64
bonds Flatbush Gas Company.....	35,700 00
180	
2,500 shares Equity Gas Light Company.....	318,065 56
bonds Equity Gas Light Company.....	250,000 00
10,000 shares Richmond Hill and Queens County Gas Light Company.....	26,758 86
600 shares Newton Gas Company.....	60,000 00
bonds Newtown Gas Company.....	61,500 00
2,000 shares Jamaica Gas Light Company.....	145,000 00
	$1,182,686 06

The book values of these securities are stated to be the amounts actually paid therefor in cash.

All these companies, with the exception of the Equity Gas Light Company, are still operating. The Equity Gas Light Company transacts no business, its properties being held and operated directly by the Brooklyn Union Gas Company. In the case of the other companies the Brooklyn Union Gas Company supplies the gas which they distribute to the consumer.

Income, Expenses and Profits:

The total amount of gas sold, with the net proceeds realized (including sales to its subsidiary companies which were made at the rate of sixty cents per 1,000 cubic feet), for the years 1901 to 1904, are as follows:

Year.	Gas sold.	Amount realized.
1901.....	4,738,536,493 c. f.	$4,676,567 68
1902.....	5,340,869,683 c. f.	5,243,188 77
1903.....	6,119,002,436 c. f.	5,992,516 63
1904.....	6,650,377,184 c. f.	6,534,611 41
	22,848,785,796 c. f.	$22,446,884 49

The expenses of the Company showing the total cost of the gas produced in holders, including repairs at works, the rate of cost in holders per 1,000 cubic feet of gas sold, the expenses of distribution (including general expenses, salaries, general repairs, taxes, insurance and all outlays except interest on funded debt), and the total cost per 1,000 cubic feet of gas sold are as follows:

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Year.	Cost in holders.	Rate per 1,000 C. F. of cost in holders.	Cost of distribution, including all other outlays.	Rate of distribution cost per 1,000 C. F.	Total cost.	Rate of total cost per 1,000 C. F. of gas sold.
1901.....	$1,746,133 30	36.85 cents.	$1,019,085 79	21.51 cents.	$2,765,218 99	58.36 cents.
1902.....	2,379,291 97	44.55 "	1,047,419 68	19.60 "	3,426,711 65	64.15 "
1903.....	2,623,988 12	42.88 "	1,078,972 38	17.64 "	3,702,960 50	60.52 "
1904.....	2,722,984 74	40.94 "	1,222,222 30	18.38 "	3,945,207 04	59.32 "
	$9,472,398 13		$4,367,700 15		$13,840,098 18	

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182 The following is a statement of the net earnings of the company from gas sales for the years 1901 to 1904, its interest on funded debt, dividends and net surplus from such earnings as shown by its books:

Year.	Net earnings.	Interest paid.	Rate of dividends.	Amount of dividends.	Net surplus from such earnings.
1901..	$1,911,348 69	$768,212 52	8%	$1,200,000 00	Deficit $56,863 83
1902..	1,816,477 12	784,023 46	8%	1,200,000 00	" 167,546 34
1903..	2,289,556 13	840,295 74	8%	1,200,000 00	Surplus 249,260 39
1904..	2,589,404 37	934,155 49	9½%	1,425,000 00	" 230,248 88
	$8,606,786 31	$3,326,687 21		$5,025,000 00	Surplus $255,099 10

The Company derived a small income from investments and from sales of gas stoves, etc., amounting for the four years to $229,321.59, making its total surplus from the entire operations of these years, after payment of interest on funded debt and dividends upon its stock, $484,420.69.

Operations of Subsidiary Companies:

The operations of the subsidiary companies whose stock is owned by the Brooklyn Union Gas Company are relatively small and unimportant. They are without the purview of chapter 385 of the Laws of 1897, fixing the price of gas Greater New York Charter, section 1539).

The receipts and expenses of these companies for the year 1904 are as follows:

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Name.		Gas sales.	Expenses.	Surplus.
Woodhaven Gas Company		$43,222 26	$33,664 76	$9,557 50
Newtown Gas Company		216,035 88	157,028 81	59,007 07
Richmond Hill and Queens County Gas Light Company		56,719 62	39,474 12	17,245 50
Jamaica Gas Company		56,201 82	43,324 88	12,876 94
Flatbush Gas Company	Gas sold	174,680 79	166,235 54	8,445 25
	Electric current sold	105,917 67	66,715 61	39,202 06

East River Gas Company of Long Island City.

The facts with reference to this Company have already been given in connection with the New Amsterdam Gas Company, which owns its stock. It does not operate independently, and the earnings from the use of its property are included in the operations of the New Amsterdam Gas Company.

Apart from its claims of rights to maintain mains in New York City under chapter 338 of the Laws of 1892, it claims franchises in Long Island City through various assignments. Its rights under these assignments are questionable and should be judicially determined.

The Kings County Electric Light and Power Company.

The Edison Electric Illuminating Company of Brooklyn.

It is understood that the Edison Electric Illuminating Company of Brooklyn, controlled by the Kings County Electric Light and Power Company, is the only company save the Flatbush Company furnishing electric current in the Borough of Brooklyn.

The Kings County Electric Light and Power Company was organized in 1890; it has a capital stock of $5,000,000 and first mortgage bonds outstanding amounting to $2,500,000. About 1898 it acquired all the stock (50,000 shares) of the Edison Electric
184 Illuminating Company of Brooklyn, issuing therefor bonds secured by a purchase money mortgage for the sum of $5,176,000. The property of the Edison Electric Illuminating Company of Brooklyn was taken subject to a mortgage securing outstanding bonds amounting to $4,275,000, making the aggregate of the outstanding stock and bonds of the two companies $16,951,000, as follows:

Capital Stock, Kings County Electric Light and Power Company	$5,000,000 00
First Mortgage 5% Bonds Kings County Electric Light and Power Company	2,500,000 00
Purchase Money 6% Bonds Kings County Electric Light and Power Company	5,176,000 00
4% Bonds Edison Electric Illuminating Company	4,275,000 00
Total	$16,951,000 00

Properties:

The property of the Kings County Electric Light and Power Company, exclusive of special franchises, is thus set forth in its statement to the Department of Taxes and Assessments of The City of New York in March, 1901:

Total value of real property other than special franchises		$1,200,000 00
Total value of personal property, exclusive of stock of Edison Electric Illuminating Company	$8,884,464 38	
Less stock Edison Electric Illuminating Company taken at	5,175,870 00	
		3,708,594 38
Total		$4,908,595 38

The combined property and construction accounts of the companies on December 31, 1904, amounted to $14,315,472.63, which is claimed to represent cash invested.

185 The companies claim to hold four special franchises originally granted upon specific conditions to the Citizens' Illuminating Company of New York, the Municipal Electric Light Com-

pany, the Kings County Electric Light and Power Company and the Edison Electric Illuminating Company of Brooklyn, respectively. The first two companies named were merged into the Edison Company.

Income, Expenses and Profits:

The Kings County Electric Light and Power Company leases its plant to the Edison Electric Illuminating Company, which operates it in conjunction with its own and out of the gross earnings of both plants pays all expenses, including interest upon the funded debt of both companies, and pays over the net earnings of its operations to the Kings County Electric Light and Power Company.

The income account of the Edison Electric Illuminating Company of Brooklyn, for the year 1904, shows:

Total gross earnings		$2,507,813 21
Income from rentals, etc		5,346 28
Total income		$2,513,159 49
Operating, maintenance, renewal and general expenses	$1,050,254 65	
Taxes and insurance	165,350 00	
Interest on loans, legal expenses and accident damage claims	18,919 66	
Doubtful accounts written off	11,574 63	
		1,246,098 94
Net earnings		$1,267,060 55
Interest paid on funded debt of $11,951,000, as follows:		
Edison 4% bonds	$171,000 00	
186 Kings County 5% bonds	125,000 00	
Kings County 6% bonds	310,560 00	
		606,560 00
Surplus after payment of interest		$660,500 55

This surplus of $660,500.55, after paying interest upon the entire funded debt, was transferred to the Kings County Electric Light and Power Company, whose income account for the same year is as follows:

Net earnings of Edison Company transferred		$660,500 55
Interest on guaranty fund, deposits, etc		46,927 00
Total		$707,427 55
Dividend 2% (issued stock, $3,750,000):		
March 1, 1904	$75,000 00	
June 1, 1904	75,000 00	
September 1, 1904	75,000 00	
December 1, 1904 (increased stock)	96,508 00	
		321,508 00
Net surplus after paying interest and dividends		$385,919 55

The accumulated surplus, after paying interest and dividends, at the end of the year 1904 was $1,047,704.68.

The amount of current sold to consumers in the years 1903 and 1904 is as follows:

	1903.	1904.
Current sold.....	32,205,831 kw. hrs.	35,062,019 kw. hrs.

187 The income from current sold during these years and cost per kilowatt hour are as follows:

	1903.	1904.
Income per kilowatt hour sold.....	9.46 cents.	8.80 cents.
Operating expenses	4.9938 "	4.3163 "
Net earnings	4.46 cents.	4.38 cents.

The amount paid in interest and dividends and remaining net surplus per kilowatt hour sold for the years 1903 and 1904, are as follows:

	1903.	1904.
Interest	2.7955	2.2219
Dividends	1.0946	1.1777
Surplus after paying interest and dividends	.58	.99
Total net earnings.....	4.46	4.38

Prior to January 1, 1905, the retail schedule of the Edison Electric Illuminating Company of Brooklyn involved a gross charge of twenty cents per kilowatt hour upon which discounts were allowed in proportion to the average total use of the consumers' installation. Since January 1, 1905, a retail schedule has been put in effect, making a minimum charge of fifteen cents per kilowatt hour for the first two hours' average daily use and reduced charges, the rates being substantially the same as those charged in the retail schedule by the New York Edison Company. The wholesale charges of the Brooklyn Company vary somewhat from those of the New York Edison. Thirty-six per cent. of the total revenue from commercial customers is under the retail schedule.

The Kings County Lighting Company (formerly Kings County Gas and Illuminating Company) operates in the Eighth,
188 Thirtieth and Thirty-first Wards of the Borough of Brooklyn and in the Borough of Queens.

The Brooklyn Borough Gas Company operates in the Thirty-first Ward of the Borough of Brooklyn (Coney Island, formerly the Town of Gravesend).

The Newtown and Flushing Gas Company operates in the Third Ward of the Borough of Queens, commonly known as Flushing. In July last it was merged with the New York and Queens Gas Company.

The Queens Borough Gas and Electric Company operates in the Fifth Ward of the Borough of Queens and in the Town of Hempstead, including the unincorporated Villages of Inwood, Cedarhurst, Woodmere and Lynbrook, and the incorporated villages at Lawrence and East Rockaway.

The New York and Queens Electric Light and Power Company also operates in the Borough of Queens.

The New York and Richmond Gas Company and The Richmond Light and Railroad Company operate in the Borough of Richmond.

These companies do business for the most part under widely different conditions from those which obtain in the more congested portions of the City. Many of them have resulted from the merger of a number of small companies through which franchises are claimed. Their financial condition and the result of the operations for the past year are shown by statements which appear in the record. It is not necessary to present a summary of these statements in this report. It should be said, however, that as in the case of the other companies the claims of franchises should be subjected to judicial scrutiny, to the end that none of them should be longer allowed to exercise rights in the streets or highways to which they are not lawfully entitled. It is also important that these companies as well as the others should be brought under a comprehensive system of supervision as hereinafter recommended.

189 Municipal Lighting.

In 1903, in accordance with a provision of the proposals for bids, the Commissioner of Water Supply, Gas and Electricity referred the bids for city lighting to the Board of Estimate and Apportionment calling attention to the absence of competition and to the charges for gas and electric lighting in The City of New York as compared with those which obtain in other cities, the conclusion being reached that the charges in New York were grossly excessive. The Board of Estimate and Apportionment appointed a Committee consisting of the Mayor, Comptroller and the President of the Board of Aldermen, which reported to the Board of Estimate and Apportionment in December, 1903. In this report the Committee among other things said:

"The prices bid for open flame gas lamps range from $12 per lamp per year, bid by the New Amsterdam Gas Company, a subsidiary of the Consolidated Gas Company, to $22 bid by the Central Union Gas Company, and $24 by the Northern Union Gas Company (both companies under the control of the Consolidated Gas Company), and $25 by the Newtown and Flushing Gas Company, Queens Borough Gas and Electric Company and Newtown Gas Company. The greatest number of open flame gas lamps in the city is, however, supplied by the Consolidated Gas Company at $17.50 and the Brooklyn Union Gas Company at $16 per lamp per year. These same prices have prevailed for many years, and while the wide range in charges may be accounted for to some extent by local conditions in different districts, the price in each district seems to be arbitrarily fixed by the company operating therein. There is no district where more than one independent company operates.

"The Consolidated Gas Company bids for 1903 for open flame lamps $17.50 per lamp per year, agreeing to furnish 22 candle power gas through a burner consuming three cubic feet per hour at a pressure not less than one inch. In the year 1882 the Metropolitan Gas Light Company, since absorbed by the Consolidated Gas Company, bid for such lights $17.50 per lamp per year, agreeing to furnish gas of from twenty to thirty candle power, through a burner consuming three cubic feet an hour at a pressure of not less
190 than one inch. In the year 1882 the lowest price charged to private consumers in the Borough of Manhattan was $2.25 per 1,000 cubic feet. During the past twenty years the cost of manufacture has been greatly reduced and the price charged to private consumers in this borough is to-day $1 per 1,000 cubic feet. It is also difficult to see why the price bid in Manhattan should be above the bid of the Brooklyn Union Gas Company for the same service in most of the Borough of Brooklyn, where illuminating gas is sold to all private consumers at the same price as in Manhattan. On the other hand, for mantle lights the price named in Manhattan is $29 per lamp per year, while the corresponding bid in Brooklyn is $31.

"A proper adjustment in prices for mantle lights with a more extended use would, in our opinion, result in marked improvement in street illumination. We are in a position to state that such improvement can be attained, and that the leading gas companies will cooperate to that end. The Consolidated Gas Company, with its subsidiary companies, at present maintains in the Borough of Manhattan and The Bronx between nineteen and twenty thousand open flame gas lamps, and somewhat less than five thousand incandescent gas mantle lamps. A mantle lamp, while consuming less illuminating gas, gives out three times as much light as the open flame burner. General use of the latter is consequently poor economy. If all the open flame burners in the boroughs of Manhattan and The Bronx were changed to mantle lamps, and the Consolidated Gas Company were given a contract for supplying 22,500 and upward of the latter, that company would materially reduce the price now bid for such lights. It may also be practicable to have the gas company supply the illuminant alone, and leave to open competition the maintenance of the lamps themselves. By changing to mantle lights, the illumination to our gas-lit streets can be more than doubled at a comparatively slight increase over the present cost. Power to make a long term contract, as previously recommended, would facilitate such a change and enable the City to secure the most favorable terms.

"The charge for 2,000 candle power electric arc lamps in Manhattan and The Bronx is $146 per lamp per year. This is far above that which is charged in other cities in the United States for the same service. There are 5,050 arc lamps in service in Manhattan and The Bronx—2,234 are served by overhead wires and 2,816 are upon underground system. The same prices are bid for
191 lamps on both systems. The prices bid for electric lighting of public buildings are also higher than the City should be compelled to pay. The New York Edison Company charges on the average 10.15 cents per kilowatt hour. The City is undoubtedly the

largest consumer of that company, but does not receive as favorable terms as certain other customers in the Borough of Manhattan. We are informed that the Edison Company is supplying current to some of their private consumers at from one-half to one-third the above rates. These consumers, of course, have the option of obtaining current from their own plants if the Edison rates are not made satisfactory—an option which the State Legislature ought certainly to grant to the City.

"The Edison Electric Illuminating Company of Brooklyn bids $124.50 per year for a 1,200 candle power lamp and 14 cents per kilowatt hour for incandescent lighting in the public buildings.

"In every borough of the city the prices for electric lighting are, in our opinion, unreasonably high. We are unable to report that under existing conditions any of the lighting companies are willing, materially, to reduce their claims or charges for lights supplied during the present year, or that upon re-advertisement of the same proposals lower prices will be bid for lights furnished the City.

"We concur in the Commissioner's recommendation that all bids received for 1903 public lighting be rejected, with this modification: that we recommend the acceptance of the lowest bid for open flame gas lamps, viz., that of the New Amsterdam Gas Company, at $12 per annum.

* * * * * * *

"We are firmly of the opinion that a city official is not justified in accepting a bid merely because the statutory requirements as to public advertisement have been complied with. The theory that the lowest competitive bid affords a practical test of what is a fair and reasonable price falls to the ground when there is no real competition. When a fair price for an article cannot be reached, or even indicated by actual competition, the sum the City is to pay should be settled after investigation into the cost of production and delivery of the commodity supplied.

"Under section 149 of the Greater New York Charter the Comptroller has power to settle and adjust all claims against the City, and through his ability to subpœna witnesses and compel them to testify under oath he has ample facilities for testing the correctness
192 of any claim which may be filed with him. The companies which have provided public lighting during the current year should file their claims with the Comptroller. Any company feeling aggrieved by his decision can doubtless recover by suit what it may be reasonably entitled to receive.

"While these various questions have been under discussion, the Comptroller has been ready and willing to pay eighty per cent, of all gas bills and sixty per cent. of all electric lighting bills without prejudice to the City or to the companies.

"In view of the recommendation made by this Committee to-day, to the effect that the bid of the New Amsterdam Gas Company for $12 per lamp per year be accepted as the standard for open flame gas lamps, it is recommended that the Comptroller limit his payments on account, so far as open flame gas lamps are concerned, to

$12 per lamp, pending the adjustment of the question in dispute between the City and the companies.

"We again urge the recommendation made to the Legislature last March, that section 530 of the Charter be so amended that the Commissioner of Water Supply, Gas and Electricity may make lighting contracts without public letting for a term not exceeding five years, when authorized by the Board of Estimate and Apportionment so to do, and also that a bill be passed empowering the City to establish and maintain an electric lighting plant for public purposes."

This report was adopted by the Board and the bids, with the exception of the bid of the New Amsterdam Gas Company (which was made in accordance with the provisions of the franchise granted to the Equitable Gas Light Company, one of its constituent companies), were rejected.

The then Commissioner of Water Supply, Gas and Electricity went out of office at the end of 1903, and his successor advertised for bids for city lighting in March, 1904. When the bids were opened they were found, with the exception of mantle gas lights in the Boroughs of Manhattan and The Bronx, to be substantially the same as those of former years. In the case of mantle lamps in the two boroughs there was a provision for a price of $24.75 per lamp on the basis of an order for 22,500, this being a substantial reduction from former prices. It was contemplated that by changing open flame
193 gas burners to mantle lights, which was highly desirable, the minimum order required to secure the low rate could be given, and this bid, upon the recommendation of the Board of Estimate and Apportionment, was accepted. The other bids, covering electric lighting in all the boroughs and gas lighting in the boroughs other than Manhattan and The Bronx, remained in abeyance, and in August, 1904, the then Commissioner of Water Supply, Gas and Electricity requested a report from the engineer of his department, which was duly made. In this report the subject of city lighting was carefully considered and the charges contrasted with those made elsewhere, and it was recommended that the bids should be rejected.

Notwithstanding this report and despite the formal action of the Board of Estimate and Apportionment in December, 1903, disapproving substantially similar bids, and although the matter, by reason of the well-considered opinion that the bids were excessive, had been permitted to remain long in abeyance, the then Commissioner of Water Supply, Gas and Electricity, on October 31, 1904, signed all the pending contracts at the prices bid. This was done without consultation with either the Mayor, the Comptroller, the Corporation Counsel or any officer outside his own department and, according to his testimony, upon his sole responsibility. At the same time the back bills of the company for light furnished in 1903 and 1904, at the prices named in their bids for those years, were certified by the Commissioner and forwarded to the Comptroller for payment. It is claimed by the Commissioner that he took this action because he had negotiated a contemporaneous agreement for a reduction in the prices for 1904 of electric current furnished by the New York Edison Company, the United Electric Light and Power

Company and the Brush Electric Illuminating Company, and for a waiver of interest upon back bills. The reduction stated was evidenced by letters under the same date as the contracts and was as follows:

"Underground 2,000 c. p. lamps from $146 to $140 per lamp per annum.

"'Overhead 2,000 c. p. lamps from $146 to $130 per lamp per annum."

194 These reductions applied to about 3,929 lamps out of a total of about 12,709 lamps, and amounted to about $43,000 a year. The letters evidencing this agreement were not forwarded to the Comptroller with the contracts, but were subsequently submitted to him when called for, pursuant to a conversation with an officer of one of the companies in which the Comptroller was apprised of their existence. The Comptroller requested that the agreements should be put in formal shape, and as a result, under date of December 3, 1904, supplemental agreements to this effect were executed.

The Commissioner of Water Supply, Gas and Electricity obtained no documentary evidence whatever of any arrangement to waive interest upon the back bills of any of the companies, nor was there any reference to such waiver even in the letters which were exchanged on October 31, 1904, or in the formal contracts subsequently executed. On the contrary, these contracts, providing for the reduction above stated, recited that the reduction was made in consideration of the payment of the back bills, without any suggestion of a release of interest where interest was collectible.

The Comptroller undertook to negotiate a release of interest in consideration of the payment of back bills, but in deference to this public sentiment, which was strongly opposed to the payment of the back bills without contest and to the signing of the contracts by the Commissioner of Water Supply, Gas and Electricity, the Comptroller finally refused to pay the back bills and negotiations were abandoned. It is understood that the companies have taken the position that their contracts for 1904 are in effect and that the reduction in the case of certain arc lamps, as above stated, has not become effective by reason of the failure of the City to furnish the agreed consideration. It is claimed by the City officials that the agreement for the reduction in the case of the three companies was a part of the transactions embracing the signing of the contracts and that the City is not bound by the latter. It will be noted, however, that in the case of the contracts with all other companies, apart from these three, there is no

195 conditional stipulation for reduction and no appropriate evidence of any agreement affecting their terms. And it is also apparent that the reduction in the prices of the three companies was insignificant in comparison with the total amount called for by the contracts signed.

The action of the Commissioner in signing the contracts for 1904 deserves strong condemnation, and has resulted in greatly embarrassing the City in its opposition to the payment of exorbitant prices. The Mayor has disapproved the action of the Commissioner, and by

his orders the [illegible] for similar prices for the year 1905 have been rejected.

Conclusions.

Prices of Gas, Pressure and Quality:

From the evidence which has been presented we are satisfied that a price of seventy-five cents per thousand cubic feet will be fair to the consumer and will afford to the companies, after allowing the proper costs for manufacture and distribution, taking into consideration all the elements of such cost, a reasonable return upon their capital investment in their gas making business. This applies to the Borough of Manhattan, the Borough of Brooklyn and a large part of the Borough of The Bronx. In our opinion it would not be just to make such a rate applicable to the more sparsely settled sections of The City of New York, in which, owing to local conditions, the cost of manufacture and distribution is necessarily higher.

The investigation has shown clearly that by increasing the pressure a quality of gas poorer than the standard required by law may be made to furnish a required degree of illumination, thus entailing an increased consumption at an increased cost to the consumer. In order that the consumer may benefit by the reduction of the price of gas, it is important that the degree of pressure should be effectively regulated. The evidence has also shown that there is at present no official inspection in any borough of the city except Manhattan, and that the inspection in the last named borough is too infrequent to be adequate. Provision should be made for a system of inspection insuring a supply of pure gas in accordance with the legal standard and its accurate measurements at the meter. This inspection should be made by officials of the City at the City's expense.

196 Price of Electric Current:

We are also satisfied that electric current can be furnished for light, heat and power purposes at a maximum price of 10 cents per kilowatt hour for the current actually consumed, and that this rate will permit a proper return to the companies, over and above all elements of cost, upon their actual investments in the business. We also think that there should be an adequate system of inspection, particularly of meters, so as to assure a charge only for the actual current furnished.

Municipal Lighting:

At the time the resolution for this investigation was introduced in the Senate, the fact that contracts had been signed for municipal lighting for 1904, had but recently become public. Since that time, the action of the Commissioner in signing the contract has been disapproved and the City has taken the position that the contracts are not binding upon it. It has also refused to accept the bids at similar prices for the year 1905. The question of the City's liability for lights furnished in the years 1903 and 1904 is now before the

courts. In our judgment there is nothing, so far as the past is concerned, requiring legislative action.

As to the future, the price to be paid for gaslights may properly be left to the action of the City's officers.

With regard to electric current for arc lamps, however, we are of the opinion that the price per lamp of the inclosed arc lamps for street lighting of 2,000 candle power, consuming at the arc 450 watts of electric current, should not exceed $100 per lamp per year; and that the price of twin lamps, that is, two lamps suspended from a single post and consuming each 250 watts at the arc, should not exceed $65 each per lamp per year.

We are also of the opinion that the City should be given authority to utilize water power now owned or hereafter acquired by it for the purpose of generating electric current for the use of the municipality, provided that no additonal water shall be used for said purposes than would otherwise be required by the City. We are advised
197 that there will be no difficulty in utilizing the water-power of the City for the purpose of generating electric current for its use without increasing the total consumption of water by the City.

Franchises:

As had been noted, serious questions are presented to the extent to which the companies are entitled to use the streets of the city. This is a matter peculiarly within the control of the City authorities, and the validity of the franchises that are claimed is a subject for judicial determination. No action by the Legislature is recommended, as the laws already in force, if properly invoked by the local authorities, are adequate to meet the demands of the situation.

Supervision of Public Service Corporations:

It is manifest that the conditions disclosed by the testimony make it necessary that the operations of the companies supplying gas and electricity, as well as those engaged in other public service, should be the subject of constant and effective supervision by a body paid by the State and clothed with power to execute its orders, subject to suitable review by the courts upon appeal. The gross abuse of legal privilege in over-capitalization and in the manipulation of securities, for the purpose of unifying control and eliminating all possible competition, shows clearly that there can be no effective remedy by general legislation or through ordinary legal proceedings, and that for the protection of the public there should be created a commission with inquisitorial authority, competent to make summary investigations of corporations, to supervise issues of securities and investment in the stocks or bonds of other companies, to regulate rates and to secure adequate inspection, and otherwise to enforce the provisions of law. The history of the subway companies affords an apt illustration of the futility of carefully phrased contracts executed in pursuance of express legislation in the absence of an effective scheme for regulation. The failure of general provisions prohibiting the consolidation of corporations is conspicuously shown

by the manner in which the provisions of the charter of the
198 New York Mutual Gas Light Company and the Act of 1886 regarding the Standard Gas Light Company has been evaded. The investment of millions in securities earning no dividends and intrinsically worthless solely for the purpose of securing monopoly control points to the necessity of strict supervision in this regard. The plan of providing a commission paid by the State and invested with ample power has worked most satisfactorily in other States, and there is every reason to believe that a similar plan put in operation here will prevent a recurrence of the mischiefs revealed in this investigation.

Specific Recommendations:

We therefore recommend—

(1) That the price of gas sold in the Boroughs of Manhattan and Brooklyn and in that part of the Borough of The Bronx west of the Bronx river should be fixed at a maximum of seventy-five cents per thousand cubic feet.

(2) That the pressure of gas in any of the street mains should not be permitted to exceed 2½ inches or to be less than 1 inch.

(3) That the standard of purity and of illuminating power of gas be fixed.

(4) That a proper system of inspection be provided to secure the enforcement of the law with reference to pressure, purity, illuminating power and accurate measurement of gas delivered.

(5) That the price of electric current for heat, light and power purposes in the Boroughs of Manhattan and Brooklyn and in that part of the Borough of The Bronx west of the Bronx river, should be fixed at a maximum of ten cents per kilowatt hour of current actually consumed and that provision should be made for inspection to secure accurate metering.

(6) That the price of arc lamps for street lighting in the City of New York should be fixed at $100 per lamp per year for single arc lamps of 2,000 candle power, consuming 450 watts at the arc, and that the price of twin arc lamps, consuming 250 ares each at the arc, should be fixed at $65 each per year.

199 (7) That the City of New York be given authority to utilize water power, now owned or hereafter acquired by it, for the purpose of generating electric current for the use of the municipality, provided that no additional water shall be used for said purposes than would otherwise be required by the City.

(8) That provision should be made for the creation of a commission, the members of which should be appointed by the Governor, with the consent of the Senate, to be paid by the State and to have general supervision of all persons and corporations having authority to lay or erect and maintain wires or pipes for the purpose of furnishing gas or electricity for light, heat or power, with power to investigate and ascertain the character of the service and reasonableness of charges, and the methods employed in manufacture and distribution, and in the maintenance of works and distributing systems, and to enforce the provisions of law applicable thereto; to

prescribe methods of keeping accounts; to examine the corporations under its supervision; to require annual reports; to examine books and papers and compel their production; to subpœna witness and to take testimony; to supervise issues and increases of securities, investments in the stocks or bond of other companies, and transfers of franchises, and to regulate rates within the limits prescribed by law. It should be provided that the orders of said commission, on confirmation by the Supreme Court at Special Term, should be enforcible by punishment for contempt in case of disobedience.

Bills to carry out these recommendations will be presented.

Respectfully submitted,

FREDERICK C. STEVENS,
Chairman,
ALFRED R. PAGE,
JAMES K. APGAR,
GEORGE B. AGNEW,
EDWIN A. MERRITT, JR.,
Committee.

Dated Albany, New York, April 29, 1905.

200 Circuit Court of the United States, Southern District of New York. The Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney-General of the State of New York; William Travers Jerome, as District Attorney of New York County; Frederic E. Gunnison, John C. Davies, and Lucian L. Shedden, Constituting the New York State Commission of Gas and Electricity, and The City of New York, Defendants. (In Equity.) Answer of the Defendant, The City of New York. John J. Delany, Solicitor for Defendant, The City of New York. No. 2 Tryon Row, Manhattan. William P. Burr, Counsel. U. S. Circuit Court, Southern District of N. Y. Filed June 4, 1906. John A. Shields, Clerk.

201 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY
against
JULIUS M. MAYER, as Attorney General; WILLIAM T. JEROME, as District Attorney; FREDERIC E. GUNNISON, and Others, Constituting the N. Y. State Commission of Gas, etc., and THE CITY OF NEW YORK.

LACOMBE, *C. J.*:

The parties to this suit are all citizens of the State *af* New York, but the main contention—practically the sole contention—of the complainant is that certain statutes of this state and an order of the Gas Commission are obnoxious to various provisions of the Constitution of the United States and for that reason void. This Court, therefore, from which appeal lies direct, without review by any intermediate tribunal, to the Supreme Court of the United States, not only has jurisdiction, but is the appropriate *forum*, because through

a suit brought here a final decision by the ultimate interpreter of that constitution can be most quickly obtained.

This is a motion by the complainant for a continuance of the temporary injunction which was issued as the condition of an adjournment asked for by defendants, and also for an enlargement of the terms of such injunction. It is in no sense a hearing
202 upon the merits of the issues presented. The fundamental propositions in dispute involve many controverted questions of fact and it is the practice of this court not to resolve such questions upon affidavits, but to reserve them for final hearing, where every sworn statement comes to the court, not *ex parte*, but after the test of a cross-examination.

The matters to be passed upon here and now can be most tersely and quickly presented by an analysis of the injunction order already made.

1. In entering that order the Court did not find, nor did it express, nor even intimate an opinion that the action of the Gas Commission in fixing the price to be charged for gas at 80 cents per 1,000 feet was confiscatory, nor that the Act of the Legislature establishing the same price (Chap. 125 of 1906) was in that respect unconstitutional and void. It did not undertake to abrogate or nullify that provision of the statute. As between the consumer and the manufacturer it left the question as to what the former should pay to the latter precisely where it stood before. Any consumer who might be asked to pay the old rate was left by the order entirely free to decline to pay it, and to make a tender at the new rate for the gas he had consumed. Naturally so, because (except for the City of New York, whose situation is exceptional) the individual consumer was not a party to the suit and had not been served with process. In the case of a consumer, who upon demand chose to pay the old rate, the order provided that the Company should not cover the 20 cents difference into its treasury, but should leave it impounded under direction of the court, so as fully to ensure its return to the person paying the same, in the event of the Company's failing to succeed in its litigation. In the case of a consumer who chose to make tender at the new rate, and to stand upon whatever rights were secured to him by the action of the Gas Commission in fixing that rate and by the action of the Legislature in establishing the same rate, the order left him entirely free
203 and untrammeled to apply for such relief as the law afforded him in the event of the company's seeking to compel payment of the difference. It was not perceived when the order was made nor is it perceived now upon what theory this court could by an injunction restrain any individual who was not a defendant and had never been served with process from himself applying to an appropriate court, if he should conceive himself to be aggrieved. What relief he might obtain when he so applied would be for that court to determine when it heard his application.

The order did, however, provide that the Gas Company might charge or demand payment at the old rate, and might collect that rate from such as chose to pay and it enjoined the defendants,—

who are public officers and as such, the proper persons to institute and prosecute actions to enforce and recover certain statutory penalties—from in any way *enforcing or attempting to enforce* two acts of the legislature and an order of the Gas Commission, or any of the provisions thereof, against the complainant, until it should have its day in court, upon such a case as it might be able to make, to question the constitutionality of that order and of those acts.

The reason why it was thought that a court of equity, irrespective of any question of the merits of the controversy as to the propriety of the new rate, should upon mere inspection of the statutes themselves, grant such temporary relief will be apparent upon the statement of a few elementary propositions of law and an analysis of certain provisions of those statutes.

A corporation which undertakes, for its own emolument, to supply gas to the inhabitants of a municipality under charters and franchises from the State which allow it to embark in such industry and invite its stockholders to invest their money therein, is engaged in what is called a "public service" or a "public utility," and therefore is under the supervision, inquisition and regulation of the State as to the manner in which it conducts its business. If, untrammeled by competition, it charges a price far above all
204 reasonable cost to the helpless consumer, who must pay that price or go without, while it receives an exorbitant return on such of its property as is invested in the enterprise, the State may step in and reduce that price to such sum as will, taking everything into consideration, be a reasonable return upon what has been adventured in the enterprise on the faith of the State's franchises. No one disputes this proposition.

But in fixing such price the State should itself be fair and reasonable—should certainly stop short of confiscation. If it were established by uncontroverted proof that, in materials, labor and wear and tear of plant at the lowest conceivable valuation, the actual cost of producing gas of a proper standard in the holders was 50 cents per 1,000 cubic feet, it would be confiscation for the State to require the manufacturer to deliver such gas to all consumers at 5 cents per cubic foot. Such an Act of the Legislature would be obnoxious to the Constitution of the State, to the Constitution of the United States, and to common rights and justice. There may be persons who dispute this proposition, but it may safely be assumed that it is accepted by every community which lives under law and not under anarchy.

These are the two extremes, and somewhere between them there lies a dividing line. Who is to determine where that dividing line lies? Under our system of government that question has always been left to the decision of the courts. Reagan *v.* Farmers' L. & T. Co. 154 U. S., 362. Smyth *v.* Ames, 169 U. S., 466. Every individual, who feels himself aggrieved either by the action of some other individual, or of the State or the Nation is secured the right to bring his grievance before some court. It may be a court of law or of equity, a court established by a statute or by a constitution, a state court or a federal court, but somewhere or other there is pro-

vided for him a forum to which he can present his case, can support it by proof and have his hearing. That is "due process of law," a heritage from long centuries of struggles which this nation and its constituent states have deposited in the corner stones of their
205 written constitution. Every one is entitled,—sometime, somewhere,—to his "day in court." The most swollen aggregation of capital, crystallized into an individual by the act of the state or national government which has made it a corporation, is as much entitled to have free access to the courts as is the humblest toiler by night to whom every additional cent, disbursed for the light he works by, means a shrinkage of his food supplies.

There are two statutes dealing with the matter now in controversy. Neither of them in express terms undertakes to deny the complainant access to any court to test the merit of the contention it makes, viz: that the new rate is confiscatory and that, therefore, the old rate should be paid. But there are two sections in those acts which challenge consideration. In the Gas Commission Act (Chap. 737 of the Laws of 1905) we find:

"SEC. 21. *Defence in Cases of Excessive Charges.*—If it be alleged and established in any action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defence to such action." In the Act which provides that companies furnishing gas in the Borough of Manhattan "shall not charge or receive for gas manufactured, furnished or sold * * * a sum per 1,000 cubic feet in excess of * * * 80 cents," we find the following:

"SEC. 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of $1,000 for such offense to the people of the state."

The drastic character of these provisions will be perceived when their results are considered. If the Gas Company, pending the final determination of a suit such as this to determine whether the legislature has fixed a just and proper price, should charge its
206 consumers the lower rate and receive the same without protest or demand of payment at the higher rate, it could never recover the difference even should it be decided by the court of last resort that it was entitled to demand such higher rate. Having delivered its product for the particular month and received the amount it asked for such product, that transaction would be finally closed; both parties having agreed upon the price, without any reservation, it would be the contract price for that month's delivery, which the seller could not thereafter dispute. If it should take two or three years to get a final decision on the merits, the twenty cents difference of rate, all claim to which during the interim the Company had thus abandoned, would concededly amount to several million of dollars. Should the company ultimately prevail in the test suit, this would be an enormous fine to pay for the privilege of having its day in court. It could escape that fine only by demanding,

on presentation of each monthly bill, payment at the higher rate preserving its claim to the difference (whenever the lower rate was paid and received) by a protest which would reiterate the demand. The statute (Chap. 737 Laws of 1905) undertakes effectually to close up that avenue of escape.

Ordinarily when there is a dispute between the seller and buyer as to the rate to be paid for anything the question is settled by the seller bringing suit for the price of what he has sold calculated at the higher rate. The statute, however, practically undertakes to debar the company from bringing any such suits against its customers. The twenty-first section (quoted *supra*) provides that if in any action brought to collect any charge for gas it shall appear that a price has been demanded in excess of the rate fixed by the Gas Commission or by statute, that fact shall be a complete defense to the action—to the whole action, not only to so much of it as seeks to collect the excess, but also to so much of it as seeks to collect the amount concededly due. Now, whenever the seller of any-
207 thing verifies a complaint to be used in an action at law which asserts that he is entitled to receive and asks to recover a sum of money, he may fairly be said to be preparing to make a demand therefor; and the moment he serves such complaint upon the buyer he has indisputably made such demand. But the statute says that the mere making of such a demand shall constitute a complete defense. It other words, if the statute is valid, the cause of action, which the plaintiff may think it has, is slaughtered at the very moment it sets foot within the halls of justice. The merits of the controversy as to what rate should be charged will never be litigated in that action because no defendant would be so foolish as to discuss any such issue, when the mere fact that action is brought relieves him from all payment whatsoever.

The only course left for the Gas Company is to bring some direct suit, such as this, to test the constitutionality of the action of the Gas Commission and of the Legislature in fixing an 80 cent rate, and meanwhile to preserve its rights to the difference by demanding payment thereof, as each monthly bill is presented to each consumer. To close up this avenue of approach to the courts, however, the other act (Chap. 125 of 1906) provides that whenever a manufacturer and seller of gas in the Borough of Manhattan shall charge or receive anything in excess of 80 cents per 1,000 cubic feet it shall, for each offence, forfeit $1,000 to the people of the State, and Sec. 1962 of the Code of Civil Procedure makes it the duty of the defendants the Attorney General and the District Attorney to institute suits for recovery of such penalties. Every time the Company demands payment for gas furnished at the higher rate, every time it receives such payment from any consumer who may be willing to pay temporarily and abide the result of the test suit, it incurs such a penalty. For very many years it has been the custom in this Borough to present monthly bills for gas sold, and it appears from the record that the complainant has upwards of 390,000 customers. The calculation is a simple
208 one. Long before this test suit could be heard next fall, the aggregate of the penalties incurred would utterly wipe out the

entire property of the complainant, whether it were worth the amount found by the Gas Commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it.

Commenting upon a statute which prescribed similar cumulative penalties for every charge of more than a certain sum per head for yarding cattle, where a few days' violation of the statute by merely *charging* a higher rate would exhaust the entire value of the property in satisfaction of the penalties incurred, Mr. Justice Brewer, writing the opinion in Cotting *v.* Kansas City Stock Yards Co. 183 U. S. 79 says: "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that upon a failure to make good that claim or defence the penalty for such failure either appropriate all his property or subjects him to extravagant and unreasonable loss? Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defence, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defence is not sufficient if upon him alone there is visited a substantial penalty for a failure to make good his entire claim or defence. * * * Suppose a statute providing that every corporation failing to establish its entire claim, or to make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except a matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?
209 * * * A statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defence a burden so great as practically to intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws." In the case cited the judges who concurred in reversing the judgment appealed from did so upon another ground, but the language of Mr. Justice Brewer, *dictum* though it be, commends itself as a clear and forceful exposition of the law.

It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City Stock Yards case, except that they are perhaps more drastic. On this branch of the case there is no controversy as to the facts, and, under the opinion last quoted, these provisions seem obnoxious to the Fourteenth Amendment to the Constitution of the United States. In order, therefore, to secure to the complainant its right to prosecute this suit to its orderly conclusion, without meanwhile being trammeled—or, as it may be more appropriately expressed, overwhelmed—by multitudinous actions for cumulative penalties, the temporary injunction which restrains the public officers, who are

made defendants, and any one else whom the injunction may reach and hold, from *enforcing or attempting to enforce*, the provisions of the acts and order of the Gas Commission against the complainant, will be continued until final hearing and decision of the cause in this court. The judge, who hears the cause upon the merits of the whole case, may find some good reason for modifying the injunction, or even for vacating it, but on the record as it stands now, to this measure of relief the complainant seems clearly entitled.

2. The application to extend the terms of the injunction,
210 so as to enable complainant to collect the 20 cent difference by summary measures, (such as refusal to supply gas) from such consumers as may not be willing to pay it, to have it impounded and to abide the result of this suit, presents different questions and brings us into a field of controversy upon the facts. However obnoxious the statutory provisions already discussed may be to the prohibitions of the Constitution, it would seem that their elimination would still leave a statute consistent and complete. Provisions hampering the right to question a rate fixed by legislative action are not essential to a scheme which undertakes to fix such rate. "It is familiar law that one section or part of any act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have exacted that which is within, independently of that which is beyond, its powers."

Regan *v.* Farmers' L. & T. Co. 154 U. S., 362.

The complainant contends that it should be protected against the irreparable injury it would suffer by reason of its inability after two or three years to collect, in the event of ultimate success, the unpaid differences from a floating aggregate of consumers, some of whom will disappear and others of whom are pecuniarily irresponsible, so that a judgment against them would not be worth the cost of entering it. It is thought that complainant's apprehensions in this respect are exaggerated. On the contrary it seems quite likely that the great bulk of its customers will prefer to pay the small amounts of excess rate demanded each month, when assured that the sums thus paid will remain secure and intact to be repaid upon the termination of the test case, should complainant not succeed therein, rather than to begin a multiplicity of suits to prevent the company from making its collections in the usual manner. The first two or three
211 months will show how this will be. Meanwhile each individual is left free to make his election, and a loss, possibly a heavy one, may result, which in the event of final success the company could not recover. This is an argument, which has always appealed most strongly to courts of equity, and there are abundant authorities to support the proposition that pending the decision of a doubtful question the *status quo*, proper security being exacted, should be preserved. But the courts in all such cases also take into consideration what is the character and measure of the doubtfulness. Here the state, which concededly has the right to fix a proper rate,

has prescribed a rate, whose propriety is challenged. *Prima facie* it is to be presumed that the state's rate is a proper one, and the burden is upon the complainant to show that it is not. If we are correct in the assumption that the penalty clauses already discussed are not an essential part of the statute without which it would be abortive, then the question of the propriety of the rate can only be decided upon a careful and exhaustive examination of many facts and deductions therefrom some of which will certainly be controverted. In the Kansas Stock Yards case, which is mainly relied upon, the fundamental vice of the statute was that it undertook to provide that the owner of a single stock-yard should charge only a named sum for each head of cattle while the owners of all other stock-yards in the state and there were several of them might charge what they pleased. That vice could be as clearly demonstrated, by undisputed affidavits, to a court upon application for preliminary injunction as it could be at final hearing. A similar vice is alleged to inhere in the later Act (of 1906) fixing the 80 cent rate, which subjects New York City gas corporations to a different rule from that applicable under the Gas Commission Act of 1905 to all the other gas corporations in this State. But if the Gas Commission Act be held to be itself unconstitutional (as complainant with great apparent force, contends here) this argument will not be so persuasive.

212 3. If the only subject of enquiry were the rate fixed by the Gas Commission a different situation would be presented. Under the authorities, in fixing the rate to be charged for "public service" by private corporations two elements of calculation are of fundamental importance. What is the true present value of the property embarked in the enterprise? And what, in view of the risks of the business, is a fair annual percentage of return thereon? That precentage would not necessarily be the same in every variety of business. The manufacture, storage and delivery of a highly explosive material is a more risky business than is the transforming of flour into bread, or of leather into shoes, and the delivery of such products. The Commission reached the conclusion that eight per cent. was a proper return on property invested in the gas business. In estimating the value of the property of complainant embarked in the business the Commission reached the conclusion that the franchises, under which it has laid mains and is delivering gas and which are a part of its property, should be considered as of no value whatever, although the State through the action of its taxing officers has declared that it is worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. That proposition need not be considered because it is not asserted that all of them have lapsed. The complainant has taken over the franchises of many different corporations granted at different times. So long as a substantial part of these still remain the argument is not affected, except as to details of result. The reason assigned by the Commission for not including the value of the franchises is that "they were granted by the people without compensation." That is so: these franchises were granted very many years ago at a time when there seems to have been no intelligent appre-

ciation of the fact that they might become enormously valuable; when reckless improvidence was the rule and all sorts of franchises were given away without any provision for securing to the
213 State its fair share of unearned increment thereon. Nevertheless when the State offers a franchise to whomever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously and fully develop it by the expenditure of his own money, and such offer is accepted and the terms of the agreement carried out by the taker, there results a contract, which—with due consideration of all proper conditions and limitations inherent in the nature of the particular contract—is as much within the protection of the Constitution as are all other contracts. If the State twenty-five or fifty years thereafter should say to the taker: "We were very improvident in not providing that you should pay us something each year for this franchise; therefore, hereafter you shall pay us eight per cent. annually on $10,000,000 or $20,000,000 or we will evict you from the franchise"—it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence.

A franchise, whatever its value may be, which has not expired, nor lapsed, nor been in some way forfeited is property in the hands of its holder. There is force in the argument that when the State says: "We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an eight per cent. return on your property" it is seeking to accomplish by indirect methods what it might not be able to accomplish directly. Moreover it is contended that the Act of 1905 under which the Gas Commission acted is obnoxious to the Constitution for grounds not already discussed apparent on the face of that act itself.

4. But in the case at bar these arguments seem wholly academic. Irrespective of any action of the Gas Commission the Legislature has itself fixed the 80 cent rate, and there is nothing to indicate upon what is predicated such action. For aught that we know it may have reached the conclusion that the Commission was in error in
214 not including the franchises at their taxable value in the estimate of complainant's property; and may, at the same time, have concluded that seven—or six or even five—per cent was a proper return to be received by the owner of such property. This brings us to the fundamental question presented by the pleadings: is the rate, fixed by the legislature, eighty cents, so low as to be unjust or confiscatory? As was indicated at the outset of this opinion, there can be no intelligent answer given to this question until the whole case is presented upon testimony taken, not *ex parte*, but according to the rules for taking testimony in equity causes. Therefore, until the court at final hearing may have the opportunity to pass upon such a record although the existing order is continued its terms will not be enlarged so as to undertake to restrain the actions of individual consumers, who are not parties to this suit and have not been served with process.

York, of February 23, 1906, during the pendency of this suit from in any way enforcing or attempting to enforce the said acts and order, or any of the provisions thereof, against the complainant, and upon reading and filing the *subpœna ad respondendum* herein, dated May 1, 1906, and the bill of complaint herein, verified the same day, and the affidavits of Walter R. Addicks, Robert A. Carter,
218 William H. Bradley and Colin C. Simpson, all verified May 4, 1906, of James A. Bennett, verified May 7, 1906, of Charles F. Dieterich, verified May 3, 1906, of Walton Clark and Emerson McMillin, verified April 30, 1906, of Allen B. Forbes, Charles S. Fairchild, Frank A. Vanderlip, Horace J. Morse and N. Wetmore Halsey, all verified May 4, 1906, of Alexander C. Humphreys, verified May 7, 1906, of Henry S. Redmond, verified May 8, 1906, of Walter R. Addicks, verified May 12, 1906, of Thomas F. Rowland, William H. Bradley, Colin C. Simpson, Alexander C. Humphreys, Robert A. Carter and Walter R. Addicks, all verified June 4, 1906, in support of the said motion, and the answer of the defendant the City of New York, verified June 4, 1906, the joint and several answer of the other defendants herein, verified June , 1906, the affidavits of William D. Marks and John K. Hayward, both verified June 4, 1906, of Frederic E. Gunnison, verified May 31, 1906, together with the printed case on appeal of all the testimony and proceedings of the Commissioners of Gas and Electricity in its investigation upon the complaints against the Consolidated Gas Company referred to in the affidavit of the said Gunnison, of Alfred R. Page, verified June 4th, 1906, of William Hallock, verified June 1, 1906, of James G. Graham, Marvyn Scudder, Peter Deyo and Henry H. Edgerton, all verified June 2, 1906, in opposition thereto, a temporary restraining order having been entered herein on May 18, 1906, and after hearing John F. Dillon, John A. Garver, Charles F. Matthewson and James M. Beck, of counsel for the complainant, in favor of the said motion and Charles E. Hughes, Esq., of counsel for the defendants, Mayer, Jerome, Gunnison, Davies and Shedden, and William P. Burr, Esq., of counsel for the defendant, the City of New York, in opposition thereto, Now, on motion of Shearman & Sterling, the solicitors for the complainant, it is

Ordered:

1. That the provisions of the said temporary restraining order shall continue in full force and effect until final hearing and disposition of this case thereat.

219 II. That payment by the defendant, the City of New York, for gas supplied to it by the complainant, at the rate of seventy-five cents per thousand cubic feet, and acceptance thereof by the complainant, under protest, shall not operate as an accord, satisfaction, waiver or estoppel to the prejudice of either party in any present or future litigation or dispute.

III. In the event of any unreasonable delay on the part of the complainant in the prosecution of this suit, the defendants, or any of them, may apply, upon notice, for an order suspending this injunction.

IV. In case the complainant shall not succeed finally in this suit, the preparation of the papers required for the refund and distribution

of the amounts in excess of 80 cents per thousand cubic feet, collected by it from its customers and paid into court, as directed herein, shall be performed by the complainant; and, upon its being shown that refund has been made by it to any consumer, by crediting the amount due him upon any current monthly bill or bills, or otherwise, such amount shall be returned to the complainant week by week or at such shorter intervals as the Court may approve. All customers who shall change their address or remove out of the Borough of Manhattan should notify the Clerk of this Court, or the complainant of such change of address, to the end that any refund to which they may eventually be found to be entitled may be paid to them at their correct address, without the necessity of their calling at the office of the Special Master or of the complainant to collect it.

E. HENRY LACOMBE,
U. S. Circuit Judge.

U. S. Circuit Court Southern District of New York. Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney General of the State of New York, *et al.* Defendants. Injunction Order. Shearman & Sterling, Solicitors for Complainant, 44 Wall Street, New York City. Due service of a copy of the within is hereby admitted June 13, 1906 Robt. C. Taylor Solicitor for Jerome Def't. A copy of the within paper has been this day received at the Office of the Corporation Counsel. June 13, 1906 John J. Dulany, Corporation Counsel. Copy of the within paper received this 13 day of June 1906 Julius M. Mayer, Attorney General. U. S. Circuit Court Southern District of New York. Filed June 16 1906. John A. Shields, Clerk.

220 United States Circuit Court, Southern District of New York.

THE CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of the County of New York; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Replication.

The replication of the Consolidated Gas Company of New York, complainant, to the answer of Julius M. Mayer, as Attorney General of the State of New York; William Travers Jerome, as District Attorney of New York County; Frederic E. Gunnison, John C. Davies, and Lucien L. Shedden, constituting the New York State Commission of Gas and Electricity, defendants.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says:

That it will ever maintain and prove this bill of complaint
221 to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant, without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein or hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain and prove, as This Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

SHEARMAN & STERLING,
Solicitors for Consolidated Gas Company of New York.

Endorsed: United States Circuit Court, Southern District of New York. Consolidated Gas Company of New York, Complainant, against Julius M. Mayer as Attorney General of the State of New York, *et al.*, Defendants. Replication. Shearman & Sterling, Solicitors for Complainants, Consolidated Gas Company, 44 Wall Street, New York City. U. S. Circuit Court, Southern District of New York. Filed Jul- 2, 1906, John A. Shields, Clerk.

222 "United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY
vs.
ATTORNEY GENERAL, THE GAS COMMISSION, and Others.

LACOMBE, *Circuit Judge:*

Replication having now been filed the cause is in condition for the taking of testimony. It is therefore sent to Arthur H. Masten, Esq., one of the Standing Masters of this Court to take the testimony, make all needed computations and fully find the facts, all in conformity to the practice indicated by the Supreme Court in Chicago M. & St. P. R. R. *v.* Tompkins, 176 U. S., 179. The master will also prior to final report, prepare and serve draft report in accordance with the approved practice in this circuit. Since the cause will ultimately go to the Supreme Court, he will be careful in taking the testimony to conform to the practice indicated in Blease *v.* Garlington, 90 U. S., 1. The ninety days allowed by the rules is apportioned as follows: 30 days to complainant, 45 to defendant and 15 to complainant in rebuttal, the time to begin to run from July 15th.

The Master will, when necessary, sit from day to day and hold two sessions a day. There is no reason apparent in the record already presented why the cause cannot be submitted to the master within the time limited. If leading counsel wish to take a vacation during the 90 days they must provide competent junior counsel to attend to the taking of testimony. To expedite matters, either side may read in evidence the testimony of any witness from the record made before the Gas Commission provided that the side so

reading shall, upon request of the other side, produce the said witness for further cross-examination."

Endorsed: Circuit Court of the United States for the Southern District of New York. Consolidated Gas Co. *vs.* The Attorney General, The Gas Commission and others. Opinion. Lacombe, C. J. U. S. Circuit Court, Southern District of New York, Filed July 5, 1906. John A. Shields, Clerk.

223 United States Circuit Court, Southern District of New York.

THE CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of the County of New York; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Replication.

The Replication of the Consolidated Gas Company of New York, Complainant, to the Answer of the City of New York.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says:

That it will ever maintain and prove this bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant, without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein or hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain and prove, as This Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

SHEARMAN & STERLING,
Solicitors for Consolidated Gas Company of New York.

Endorsed: United States Circuit Court Southern District of New York. The Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney General of the State of New York, and others, Defendants. Replication. Shearman & Sterling, Solicitors for Complainant, 44 Wall Street, N. Y. U. S. Circuit Court Southern District of New York. Filed July 12 1906. John A. Shields, Clerk.

224 At a Stated Term of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building in the Borough of Manhattan, City of New York, on September 10, 1906.

Present: Hon. E Henry Lacombe, Circuit Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK
against
JULIUS M. MAYER, as Attorney General of the State of New York, and Others.

Order Appointing Special Master.

Issue having been joined in this case on the bill of complaint, answers and replication on July 5, 1906, Now, on the Court's own motion, it is

Ordered:

1. That Arthur H. Masten, Esq., one of the Standing Masters of this Court, be and he hereby is appointed Special Master to take all the testimony herein, and make all needed computations and fully find the facts. The said Master shall, before making his
225 final report, prepare and serve on the solicitors for the parties hereto, a draft of such report. The time for taking testimony before the said Special Master shall be appointed herein as follows: The plaintiff shall have thirty days for the introduction of its *prima facie* evidence, the defendants shall then have forty-five days for the introduction of their answering evidence and the complainant shall then have fifteen days for the introduction of rebuttal evidence. The time shall begin to run from July 15, 1906. Hearings shall continue from day to day, and, if necessary, two sessions shall be held each day.

II. This order shall be entered and filed *nunc pro tunc* as of July 5, 1906.

Enter E. HENRY LACOMBE, *U. S. C. J.*

Endorsed: United States Circuit Court Southern District of New York. Consolidated Gas Company of New York, against Julius M. Mayer as Attorney General of the State of New York, and Others. Order Appointing Special Master. Shearman & Sterling, Attorneys for Complainant, 44 Wall Street, N. Y. U. S. Circuit Court Southern District of New York. *Nunc pro unc* July 5 1906. Filed Sep. 11 1906. John A. Shields, Clerk.

226 Circuit Court of the United States, Southern District of New York.

THE CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC C. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Master's Report.

To the Honorable the Judges of the said Court:

I, the undersigned, one of the Standing Masters of this Court, to whom, by direction of the Honorable E. Henry Lacombe, Circuit Judge, it was, on the 9th day of July, 1906, referred "to take the testimony, make all the needed computations and find fully the facts" herein, do hereby respectfully report that, having been
227 attended by counsel as below stated, I proceeded to take the proofs submitted by the several parties and to hear arguments thereon. The proofs so taken, consisting of nine volumes of printed testimony, pages 1 to 6956 inclusive, and five volumes of printed exhibits, pages 1 to 2771 inclusive, are herewith submitted and filed, together with a stipulation signed by the various solicitors of record, waiving the signatures of the various witnesses to their several depositions and further waiving the filing of the original exhibits marked in evidence.

There appeared before me counsel as follows:

For Complainant: Messrs. John A. Garver, Charles F. Mathewson and Carl A. Mead.

For Defendants Mayer, as Attorney General, and Gunnison *et al.*, constituting the New York State Commission of Gas and Electricity: Messrs. Alfred R. Page, Howard S. Gans and Gustavus T. Kirby; also on the briefs, Messrs. David B. Hill and William A. Deford.

For Defendant The City of New York: Mr. William P. Burr, also, on the briefs, Messrs. William J. Clarke, Edwin J. Freeman and Alfred W. Booraem.

Upon the proofs so taken I find and report as follows:

It is sought in this action to declare illegal and void,

1st. Chapter 736, Laws of 1905, which fixes the price of gas supplied to the City of New York at 75 cents per thousand cubic feet.

2nd. Chapter 737, Laws of 1905, which establishes a Commission of Gas and Electricity, with power, among other things, to regulate the price of gas, fix the standard of its illuminating power and purity when sold for illuminating purposes, and to establish a standard of pressure at which it shall be delivered; also an order made by said commission, on February 23rd, 1906, directing that

the maximum price for gas which shall be charged by the Consolidated Gas Company, in the Borough of Manhattan, City
228 of New York, shall be 80 cents per thousand cubic feet, that the gas delivered by it shall have an illuminating power of not less than 22 sperm candles of six to a pound, and that it shall be delivered at a pressure of not less than one inch or more than 2½ inches, in any service mains in said City.

3rd. Chapter 125 of the Laws of 1906, which establishes a maximum rate of charge at 80 cents per thousand cubic feet for gas sold in the Borough of Manhattan and certain other portions of the City of New York and requires that the gas so delivered shall be of 22-candle power, as fixed by said Commission, and provides further that the pressure in any service mains in the City of New York, any distance from the place of manufacture shall not be less than one inch nor more than 2½ inches under penalty of $1000 for each offense in case of failure.

Besides other alleged grounds of invalidity specified in the bill, it is claimed that the foregoing Statutes and Order are in contravention of the 14th Amendment of the Constitution of the United States in that they deprive the Complainant of its property without due process of law and without just compensation and deprive it of the equal protection of the laws. The Complainant urges that the rates fixed by said Statutes and Order do not afford a fair and reasonable return upon the value of its property invested in the gas business and that harsh and unusual penalties are exacted for violations of the requirements as to pressure, although such violations cannot be avoided in the reasonable conduct of its business. Other important issues unnecessary to be specified are presented by the pleadings and have been dwelt upon to some extent in the arguments of counsel. They involve questions of law alone and the discussion of such questions is not within the scope of this report, save in so far as may be incidentally necessary in applying the principles according to which the issues of fact are to be determined.

The questions of fact, speaking broadly, are as follows:

229 1. The value of the assets employed in the production and distribution of the gas sold by Complainant.

2. The cost to the Complainant of the production and distribution of gas to the consumer.

3. Whether or not the rate allowed by said statutes and order afford to Complainant a fair and reasonable return upon its investment.

4. The possibility of maintaining at every point and at all times in Complainant's mains a pressure within the limits prescribed by the Statute.

Before taking up these questions the origin and development of the Company may be briefly considered.

Organization and Capitalization of the Company.

The Complainant has an authorized capital of $100,000,000, of which $80,000,000 have been issued. It was organized in November, 1884, by the consolidation of six then existing gas companies, as follows:

New York Gas Light Company, incorporated 1823.

Manhattan Gas Light Company, incorporated 1830.

Metropolitan Gas Light Company, incorporated 1848.
Harlem Gas Light Company, incorporated 1855.
Municipal Gas Light Company, incorporated 1874.
Knickerbocker Gas Light Company, incorporated 1876.

It was originally intended that the New York Mutual Gas Light Company, incorporated 1866, should join in the consolidation but it was prevented from so doing because of a prohibition in its charter. The Statute pursuant to which the consolidation was carried into effect, Chapter 367 of the Laws of 1884, entitled "An Act to authorize the Consolidation of Manufacturing Corporations," authorized corporations consolidating thereunder to form a single corporation which might be capitalized and issue its shares to an amount
230 not exceeding "the fair aggregate value of the property, franchises and rights of the several Companies thus to be consolidated." An appraisal was accordingly made during the Summer of 1884 of the tangible property of the six constituent companies, amounting in the aggregate to $30,052,453.96. Upon revision the final total was reduced to $29,994,000.

The value of the franchises and rights of the constituent Companies was then estimated at $7,781,000, said sum being by agreement between the Companies apportioned among them in proportion to their respective sales of gas.

The amount of the capital and assets of the Complainant as of June, 1884, exclusive of working capital in the shape of cash, accounts receivable and current supplies, was made up as follows:

Real Estate	$10,332,000
Plant	12,175,000
Mains	5,217,000
Services	1,005,000
Meters	1,195,000
Office Furniture & fixtures	70,000
	$29,994,000
Franchises & Rights	7,781,000
	$37,775,000

The figure at which these assets were acquired by the Complainant company and upon which its books were opened, was accordingly $37,775,000; although the authorized capital of the Company was fixed at $39,078,000, upon the basis of the actual market value of the shares of the constituent Companies at that time, leaving a balance of $1,303,000 to provide working capital.

Stock to the aggregate of $37,775,000 was thereupon issued in purchase of the assets of the six constituent Companies, appraised as above stated, except that $2,329,000 were retained in the treasury of the complainant company to retire obligations of a like
231 amount of said constituent companies which might be a lien on the property, and $15,940 were retained for the purpose of making sundry adjustments pursuant to agreement, the balance, $35,430,060, being issued directly to the shareholders of the constituent companies as follows:

For Plant and Property as above.....		$29,994,000
Less amount retained to retire obligations of constituent companies.....	$2,329,000	
Add for Sundry Adjustments.....	15,940	
		2,344,940
Balance		27,649,060
For Franchises and Rights, as above.....		7,781,000
Total		$35,430,060

In April, 1900, the capital stock was increased to $54,595,200, such increased capital being used for the retirement of debentures which had been issued by the Company for the purchase of the entire stock of the New York Gas and Electric Light, Heat & Power Company, amounting to $36,000,000 in par value. The business of this Company consisted of the manufacture and sale of electricity. It was consolidated in 1901 with the Edison Electric Illuminating Company, under the name of the New York Edison Company. Stock of the new company thus formed to the amount of $45,041,000 out of a total issue of $45,051,000 was taken by the Consolidated Gas Company in exchange for its shares of the New York Gas and Electric Light, Heat & Power Company, and now stands upon its books at a valuation of $18,202,969.63.

In July, 1900, Complainant's capitalization was further increased to $80,000,000. Of the new shares $3,773,600, in par value were issued to retire debentures which had been given in payment for shares of the New Amsterdam Gas Company. Of the remain-
232 der ($21,631,200 in par value) $900,000 were sold in open market at 193⅜, and the residue were disposed of to stockholders at 150, the proceeds aggregating $32,837,175. The funds thus realized were used in the purchase of securities of other Companies, as hereinafter more particularly stated, and in the repayment of loans.

In July, 1904, authority was obtained for a further increase of the capital stock to $100,000,000. The additional shares have not been issued but 6 per cent debentures have been issued and taken by the stockholders to the amount of $19,857,600, which are convertible into stock of the Company at par, at the option of the holder.

Value of Assets Employed in Complainant's Gas Business.

The Courts have recognized that in litigations to obtain judicial review of the reasonableness of the rates charged by public service corporations, each case must be determined to a large extent upon the particular facts presented. No absolute rule can be prescribed, though certain well-defined principles have been established from which it is possible to determine many of the elements necessary to be taken into consideration. As stated in *Smyth vs. Ames*, 169 U. S., 466, 546, an authority cited with approval in all the recent cases of this character, these principles are as follows:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under Legislative sanction must be the fair value of the

property used by it for convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under the rates prescribed by statute and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.

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"We do not say that there may not be other matters to be regarded in estimating the value of the property. What the Company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In the present case the proofs present the usual divergence of views as to the value of the property concededly employed. There is also a controversy as to whether or not a number of important items may properly considered as among the assets on which complainant is entitled to a return.

It is conceded that the determination of the value of Complainant's property devoted to the public use should be made approximately as of the date of the Statutes and Order in question, and, for the purposes of convenience, the year ending December 31st, 1905, has been selected as the appropriate period for particular study of the affairs and operations of the Company.

The assets on which Complainant claims to be entitled to a return and its estimates of the present value thereof are shown below in contrast with the valuations of Defendant's witnesses, as summarized in briefs of counsel.

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	Complainant.	State.	City.
1 Real Estate	$14,558,000.*	$10,504,355.95	$10,587,685.
2 Plant	15,532,489.*	9,318,692.	9,348,692.
3 Mains	12,636,000.	7,383,533.	6,529,035.
4 Services	1,994,000.		1,222,228.
5 Meters & Miscellaneous property.	4,200,000.	3,802,544.	3,261,687.
6 Working capital, to wit, Current supplies	616,470.08	(See *post* p. 43.)	(See *post* p. 43.)
Cash and accounts	3,000,000.		
7 National Coal & Coke Co.	50,000.		
8 Astoria Plant	12,000,000.		
Total, excluding franchises and good will	$64,586,959.08		
9 Franchises	24,000,000.		
10 Good will	7,500,000.		
Total assets actively employed	$96,086,959.08	$31,039,124.95	$30,949,327
Proceeds of Debentures, not yet in "Plant," but temporarily invested pending such investment	$5,500,000.00		
Total investment, active and inactive	$101,586,959.08		

* Exclusive of 18th St. property condemned by the City.

The above items will be considered in their order.

I.

Real Estate.

This comprises some 50 parcels variously located in New York City and one parcel of water front property, known as "Shadyside," on the New Jersey shore of the North River. By far the greater part of the real estate belonged to the constituent companies before the consolidation and was purchased many years ago at prices much below its present value.

235 The term "real estate," as employed in the books of the Company comprises land and water rights, including only such appurtenances as offices, stables and the like, and excluding all buildings and structures which are a part of the manufacturing or distributing plant of the Company. The structures included being of slight value as compared with the value of the land, the term "real estate" as thus used is practically synonymous with "land." The Complainant has introduced evidence showing the gross valuation of its real estate to be approximately $16,000,000. Included in this, however, is the sum of $1,392,500 representing the value of certain real estate forming a portion of its 18th Street Station which was acquired by the City of New York under eminent domain but has never been paid for. The valuations of defendant's witnesses for the corresponding property approximate $12,000,000, though it is not conceded that the condemned property should be taken into account nor that all of the other property valued is properly to be considered as a part of Complainant's assets used in gas manufacture. The assessed valuation of the same property on the books of the City approximates $8,500,000 for the land alone and $12,000,000 for the land with improvements. Included in the latter assessment, however, are various structures constituting the manufacturing or distributing plants of Complainant.

Three witnesses, Messrs. Wheelock, Preiss and Greene, were called by the Complainant, the testimony of the latter being confined to the value of bulkheads and lands under water. Two witnesses, Messrs. Thompson and McHale, testified on behalf of the City, and one, Mr. Wells, on behalf of the State. Owing to the diversity of methods followed in the presentation of their testimony, it has been difficult to make any comparison of their respective figures that is wholly satisfactory. The accompanying table, printed to face this page, affords, however, a reasonably accurate basis for such comparison. Without discussing in detail the evidence as to each parcel, I may say that, after a careful consideration, I am satisfied

Recapitulation and Comparison of Real Estate Valuations.

	Wheelock.	Preiss.	Thompson.	McHale.	Wells.
Land	15,499,500.00	14,134,611.00	11,781,865.02	11,956,521.61	$9,663,507.60
Buildings	151,000.00	171,000.00	96,500.00	96,500.00	(c) 96,500.00
Shadyside	300,000.00	(a) 300,000.00	245,000.00	245,000.00	(d) 245,000.00
Bulkheads and land under water	(included above with land)	(b) 1,448,750.00	(included above with land)	(included above with land)	(e) 779,597 40
Twelfth Avenue	do.	(included above with land)	do.	do.	(f) 539,000.00
Part of 18th Street Condemned	do.	do.	do.	do.	(g) 1,008,808.87
Total	15,950,500.00	16,054,361.00	12,123,365.02	12,298,021.61	$12,332,413.87
Difference between value of 18th St. land including and excluding land condemned.	1,392,500.00	1,574,589.00	1,008,808.87	1,008,808.87	(g) 1,008,808.87
Value excluding land condemned	$14,558,000.00	$14,479.772.00	11,Y14,556.15	$11,289,212.74	$11,323,605.00

(a) Wheelock's Valuation—Preiss did not value this parcel.
(b) " " —Where Wheelock valued land and bulkhead together the value of bulkhead has been found by deducting Preiss's value of land from Wheelock's total value—Preiss did not value any bulkheads or land under water.
(c) Thompson's Valuation—Wells did not value any buildings.
(d) " " — " " " " this part.
(e) " " — " " " " bulkheads except 110th to 111th Sts. Harlem River.
(f) " " —Obtained by deducting Wells' valuations, which omitted Twelfth Avenue, from Thompson's Valuations, which included Twelfth Avenue.
(g) Thompson's Valuation—Wells did not value that portion of 18th Street land which has been condemned.

238 that the valuations claimed by the Complainant are, as a rule, approximately correct. In arriving at that conclusion I have taken into account the standing and qualifications of the various witnesses, the degree of care devoted to their investigations, the extent of their familiarity with general real estate conditions in the City of New York, and their demeanor under cross-examination.

The chief witness for the Complainant, Mr. Wheelock, is connected with one of the largest and best known real estate offices in this City and has taken part personally in the actual purchase and sale of a very large amount of property in various parts of Manhattan Island. Preparatory to testifying in this case, he spent some six weeks in an examination of the properties and an investigation of such facts as would tend to enlighten him as to their value, including sales of neighboring property.

Mr. Preiss, a real estate dealer and appraiser of many years' experience, was also very fully advised as to current real estate transactions.

Mr. Greene, as engineer in chief of the Department of Docks for many years, acquired a familiarity with the terms of leases and sales of water front property and was qualified by experience to testify as to values in a degree not shown by any of the other witnesses.

Messrs. Thompson and McHale, the witnesses called by the City, appear to have made a specialty of appraising rather than of dealing in real estate as brokers. As appraisers, their experience has been to a considerable extent in condemnation proceedings where they have testified on behalf of the City or in *certiorari* proceedings for the reduction of taxation, on behalf of the property owners. Their manifest tendency was towards ultra conservatism of views, and I am satisfied that in the present case their valuations (which are frequently identical) are, in almost every instance, considerably too low. Their cross-examination disclosed numerous instances in which they disclaimed knowledge of actual sales in the immediate vicinity of the parcel under consideration, notwithstanding such sales were matters of public record. In a dozen or more instances their
239 valuations approximated, or were substantially below, the assessed valuation of the land. It is, of course, true that the assessed valuation of real property is often equal to or higher than its actual value, but it is generally understood, and was in fact admitted on the record, that, as a rule, tax values are substantially lower than the prices that can be realized for property sold under ordinary conditions. When, therefore, in so many instances Defendants' witnesses made their valuations approximate closely the assessed valuations, some question is suggested as to the weight to be given to their judgment.

Mr. Wells, the witness called by the State, was an auctioneer, broker and appraiser of long experience, and also had acquired familiarity with real estate values as Commissioner of the Tax Department for several years. His record, however, discloses no such extensive transactions, and particularly current transactions, as those with which Mr. Wheelock was connected. Like the other witnesses called by Defendants, he was not familiar in many instances with

recent sales of property in the immediate neighborhood of the particular parcel under consideration. Taken as a whole, the testimony of these gentlemen does not show that they gave to their appraisals the amount of care and study that characterized the work of Complainant's witnesses. For example, one witness in valuing the property occupied by the Company at 42nd Street and 44th Street, excluded that portion of it comprised within the lines of 12th Avenue, on the ground that the Company had no title thereto. He failed, however, to make any allowance for the fact that on this theory certain of the lots remaining would have an enhanced value as corner lots which, according to well known rules, make them worth often 50 or 60 per cent. more than interior lots in the same block. In another instance no allowance was made for the circumstance that the parcel in question had a frontage both on an avenue and a side street. The discrepancy between Complainant's valuations and those of the Defendant was especially noticeable in respect of the large parcels. As to those, Defendants' witnesses made what seem to me an insufficient allowance for what is known as "plottage" or the enhancement of value due to the concentration in a single ownership of a number of adjoining lots. This is a well recognized element of value, and one which has assumed increasing importance in recent years owing to the growing demand for large building sites. In repeated instances Defendants' witnesses were unable to specify any transactions in the neighborhood at unit figures as low as those given in their valuations, whereas Complainant's in the great majority of cases were able to substantiate or at least to some extent to support their estimates by reference to actual transactions.

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Taking the testimony as a whole my conclusion is that the present value of complainant's real estate (exclusive of that part of the 18th Street station condemned by the city) is the sum of $14,161,000. This includes the buildings valued by the witnesses and the various bulkhead properties, also the property at Shadyside, New Jersey, and is allotted between the various parcels as follows:

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Block.	Lot.	Location.	
1643,	56-57-58	S. W. Cor. Lexington Ave. 116th St.	$85,000
1642,	32-33	N. W. Cor. 3rd. Ave. & 114th St....	95,000
870,	54-56-59-60	S. E. Cor. Irving Pl. & 15th St.....	300,000
239,	1-5	N. E. Cor. Hester & Elizabeth Sts..	182,000
985,	7-19-20-39-40	Between Avenues B & C, 17th. to 18th. Sts.....	260,000
972,	45	S. S. of E. 15th St. bet. Avenues A & B.....	22,000
982,	13	14th. to 15th Sts. West of Avenue C.	430,000
989,	1	15th. to 16th Sts. East of Avenue C.	180,000
989,	26	15th. to 16th. Sts. West of Avenue D.	124,000
991,	26	15th. to 16th. Sts. Ave. D to Tompkins St.....	157,000
991,	1	14th. to 15th. Sts. Ave. D to Tompkins St.....	233,000
988,	1	Avenue C to Ave. D, 14th. to 15th Sts.....	570,000

Block.	Lot.	Location.	
991,	47-50	Bulkheads East River, 14th. to 16th. Sts.	282,000
688,	.....	16th. to 17th. Sts. 10th to 11th Av's.	400,000
689,	.....	17th. to 18th. Sts. 10th to 11th Av's.	470,000
690,	12-40-42-43-44-45 48-49-50-51-52-53	18th. to 19th. Sts. West of 10th. Avenue	452,000
691,	.....	19th. to 20th. Sts. East of 11th. Avenue	186,000
716,	14	N. S. 18th. St. bet. 9th. & 10th. Ave's.	43,000
715,	51-59	S. S. 18th. St. bet. 9th. & 10th. Ave's.	121,000
951,	35	S. S. 20th. St. bet. 1st Ave. & Ave. A.	76,000
952,	7-29-30-33-34-35	20th. to 21st. Sts. West of Avenue A.	435,000
953,	1	21st. to 22nd. Sts. 1st. Ave. to Ave. A.	615,000
979,	1	21st. to 22nd. Sts. Ave. A to Marginal St.	570,000
978,	1-2-3-5-6	20th. to 21st. Sts. Ave. A to Ave. B.	537,000
987,	37-41-42-43-51	20th. to 21st. St-. Ave. B to Marginal St.	114,000*
1090,	23	N. S. 42nd St. bet. 11th. & 12th. Ave's.	72,000
1071,	10-11-12-13,	N. S. 42nd. St. bet. 10th. & 11th. Ave's.	57,000
1070,	5	N. S. 41st. St. St. bet. 10th. & 11th. Ave's.	83,000
1089,	1	41st. to 42nd. Sts. 11th Ave. to Hudson R.	1,150,000
1107,	7	Pier & Bulkhead Hudson R. 41st. to 42nd Sts	included in above.
1092,	1-28-38-38½-39	44th. to 45th Sts. 100′ W. 11th Ave. to R.	645,000
1107,	23	Bulkhead 44th. to 45th. Sts.	225,000
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1093,	1	45th. to 46th. Sts. 225′ W. 11- Ave. to R.	546,000
1107,	28	Bulkhead 45th. to 46th. Streets.	225,000
1457,	6	62nd. to 63rd. Sts. bet. 1st. Ave. & Ave. A.	175,000
1455,	13	60th. to 61st. St. West of Avenue A.	220,000
1474,	24	N. E. Cor. Ave. A and 60th. St.	25,000
1177,	21	65th. to 66th. Sts. W. of West End Ave	190,000
1157,	1	65th. to 66th. Sts. Amsterdam to W. End Ave.	700,000
1156,	45-46	S. S. 65th. St. E. of West End Ave..	40,000
1670,	1	98th. to 99th. Sts. 1st. to 2nd Ave's.	665,000
1692,	1	98th. to 99th. Sts. 1st. Ave. to Marginal St.	255,000
1683,	18-34-35,	111th. to 112th. Sts. West of 1st. Ave.	118,000
1682,	6-11	110th. to 111th. Sts. West of 1st Ave.	435,000
1704,	1	110th. to 111th. Sts. 1st Ave. to Pleasant Avenue..	490,000
1712,	2	Bulkhead etc. 110th. to 111th. Streets.	71,000
1999,	1	132nd. to 133rd. Sts. East 12th. Ave.	445,000
2175,	15-18-22-100,	Inwood.	90,000
			13,861,000
		Shadyside, N. J.	300,000
			$14,161,000

*[In pencil in copy:] 2,347,000.

243 *Deductions Claimed.*

The Defendant, the City of New York, urges that the Complainant has included in its valuations property that is leased by it to other parties, property which it does not own, and property that is vacant or unimproved, all of which should be deducted. It is argued that the Complainant is not entitled to capitalize as against the consumer unnecessary property or property not actually in use, whether plant or real estate, citing *Brunswick & T. Water District vs. Maine Water Co.*, 59 Atlantic Rep., 537, 539; *Capital City Gas Light Co. vs. City of Des Moines*, 72 Fed. Rep., 820, 842.

The total valuation of the lands which it is claimed should be thus deducted, according to the respective figures of Mr. Thompson, the City's witness, and Mr. Wheelock, the witness for Complainant, are computed in the City's brief as follows:

	Thompson.	Wheelock.
Land leased	$216,810.	$268,250
Land Vacant	650,757.20	757,155
Land not owned	614,517.04	932,255
Land unimproved	621,305.16	1,115,750
Shadyside	245,000.	300,000
Total	$2,348,389.40	$3,373,410

(*A*) *Land Leased:*

The leased parcels consist of 22 city lots forming parts of 8 different parcels:

(1.) Block 985, between 17th and 18th Streets, Avenues B and C. There are two gas holders on this plot and a storage yard occupied by Complainant's street department for storing pipe and fittings. There are in all 28 city lots, of which 8 are leased to contractors for storing material, at a rental of $3,170.

(2.) Block 690, between 18th and 19th Streets, Tenth Avenue and Marginal Street. Practically all of this block is owned by Complainant. There are two gasometers and a one story brick building on the property, also a wagon yard. Five lots are rented for $2,000.

244 (3.) Block 978, between 20th and 21st Streets, Avenues A and B. Practically all of this block is owned by the Gas Company. Three tenement houses and a lot 70 feet by 200 feet are leased by it at a rental of $2916. The lower floor of 329 Avenue A is used as a gas fitting shop.

(4.) Block 1092, between 44th and 45th Streets, Eleventh Avenue and North River. Practically the entire block is owned by the Gas Company and used for gas making. It has 5 gas holders and a coal shed. There are four tenement houses occupying about 50 feet front on 45th Street, and one tenement house occupying 25 feet on 44th Street, the latter rented for $360.

(5.) Block 1156, between 64th and 65th Streets, Amsterdam and

West End Avenues. The entire block between 65th and 66th Streets is occupied by gas holders. A small piece on the lower side of 65th Street, consisting of 4 lots, has upon it one tenement house rented for $1248. The remainder of the plot is being prepared for a valve house, for which plans have been filed.

(6.) Block 1692, between 98th and 99th Streets, First Avenue and Marginal Street. The main plant of the 99th Street works occupies the adjoining block between First and Second Avenues. The block in question, lying to the east of First Avenue, is used for storing coal and other material for the purposes of the 99th Street works, with the exception of one small tenement house, which is occupied by the foreman of Complainant's street department.

(7.) Block 952, between 20th and 21st Streets, First Avenue and Avenue A. Several entire blocks in this vicinity are occupied by Complainant's plant. The plot in question contains two small tenement houses one of which is rented for $498 the other being occupied by the foreman of the works.

(8.) Block 1683, between 111th and 112th Streets, First and Second Avenues. Block 1682, on the south side of 111th Street, is occupied by gas holders and a valve house. Another block
245 to the east of First Avenue is occupied for the storage of material belonging to the Company's street department. The piece in question, in Block 1683, is occupied in part by the Company's stable, the horses being turned out into a vacant portion of the premises. There are also two city lots rented for the purpose of storing push carts.

The leases of the foregoing parcels are, as a rule, terminable on 30 or 60 days' notice. In almost every case the lots in question are fractions of a large plot, the remainder of which is actually covered by the Company's operating plant, or they are immediately adjacent to portions of such plant. They are available at any time for purposes of extension by reason of the termination clause in these leases. The tenement houses are to a considerable extent occupied by employees of the Complainant, whose advantage it manifestly is to have its employees near at hand in case of emergency. The proper conduct of Complainant's business requires a large land area and when the property was originally acquired by Complainant or its constituent companies, it can hardly be doubted that it was sound business policy to purchase these entire tracts, notwithstanding the whole area of each block purchased might not be immediately required. Ordinary business prudence required the Company to anticipate the growth of the Company and the requirements of increased business. If odd lots occupied at the time by tenement houses, for instance, had been cut out they would detract from the value of the balance of the block and hamper the Company in making such necessary extensions or additions as might from time to time be required. In plants as large as those of Complainant it is inevitable that there should be here and there a small lot not covered at the moment with material or apparatus, but which, in view of the requirements of the business it would be extremely poor policy to sell. Its use may at any time be required. The Company would not, of course, be jus-

tified in buying and holding real estate merely because of the fact that it was likely to enhance in value and irrespective of any
246 necessity therefor in the business of gas making. On the other hand, it seems clearly unreasonable to require that every plot of land owned by the Company should be occupied to its utmost capacity and in constant use, in order that such property should be considered as part of the Company's gas making investment. In my judgment, none of the property in question can properly be regarded as unnecessary, under the circumstances. It may be pointed out further that the fact that these properties are rented as above described does not necessarily impose any additional burden upon the consumers of gas, notwithstanding their value is included with the assets of the Company on which it is entitled to a return. The real estate rents appear as part of the miscellaneous income of the Company and as will hereinafter appear, they are taken into account in determining the net profits of the Company applicable to dividends.

(*B*) *Land Vacant:*

This consists of seven different plots.

(1) Block 1643, between 115th and 116th Streets, Park and Lexington Avenues. This is a single parcel, 100 feet by 80 feet, stated to have been acquired for the purpose of constructing an office building thereon. It has been used for the storage of pipe.

(2) Block 1455, between 60th and 61st Streets, First Avenue and Avenue A. This is a plot 313 feet by 200 feet, acquired, as it is stated, for the purpose of constructing holders thereon. They have not been erected but mains have been recently laid from the terminus of the Company's tunnel at 71st Street for the purpose of conveying gas to the holders.

(3) Block 1156, between 64th and 65th Streets, West End and Amsterdam Avenues. A tenement house on this property is leased as hereinbefore stated. Plans have been prepared for the construction of a valve, boiler and exhauster house, to be located on these premises, and it was intended to begin work thereon last year, although the work has not in fact been begun.

247 (4) Block 1999, between 132nd and 133rd Streets, Broadway and Twelfth Avenue. This plot, 675 feet by 199 feet, in its longest dimension, is occupied by one gas holder. There is room for the construction of two additional holders and it is stated to be held by the Company for that purpose.

(5) Block 2175, Sherman Avenue and Broadway. This is a parcel of irregular shape, on which are now located a small gas holder and a valve house. So far as may be determined from the proof, only about one-quarter of the premises is thus occupied.

(6) Block 972, between 14th and 15th Streets, Avenues A and B. This is an irregular parcel near Complainant's 14th Street Station. There is nothing on the property except a pump house and well which has not recently been in use.

(7) Block 1474, between 60th and 61st Streets, Avenue A and East River. This is an irregular plot adjacent to the Complainant's 63rd Street Station, held, as is stated, for the purpose of constructing a holder thereon.

Of the seven plots above described only two are wholly vacant. In view of their proximity to other property of the Company, and in default of further evidence of unavailability than is shown by the record, I find that they may reasonably be considered as a proper part of its operating plant. In the single instance where the evidence gives no indication that the property is not used or intended to be used in some way in connection with the gas business, namely, the parcel on the south side of 15th Street, Block 972, the amount involved is not large. Its value, according to the witnesses for the City, is about $12,000. Under the circumstances and in view of the numerous uses to which the property of this sort can properly be put for storage and other purposes by Complainant, I am not disposed to exclude it.

(*C*) *Land not Owned by Complainant:*

The property embraced in this category is valued by Mr. Thompson for the City at $614,517.04, and by Mr. Wheelock for the Comp-ainant at $932,255. It consists,

248 (1) Of the land under water within the lines of Tompkins Street, between 14th and 16th Streets, East River, and certain lands adjacent thereto on either side.

(2) The lands within the lines of Twelfth Avenue, between 41st and 42nd Streets and 44th and 46th Streets and the North River; and

(3) Lands within the lines of Exterior Street, between 110th and 111th Streets, Harlem River.

Evidence was introduced tending to show that Complainant's title to the lands within the line of the streets was derived under grants by which there was reserved from the premises conveyed so much thereof as might be assigned, designated or laid out for public streets. Under the terms of the grants the grantees covenanted to build and constructed such streets within three months after receiving notice so to do from the City authorities. It was further shown that Tompkins Street, Twelfth Avenue and Exterior Street have all been laid out and established by the filing of maps. It is not claimed, however, that notice has ever been given by the City requiring the physical construction of the streets as contemplated by the terms of the grants. As to the lands outside of Tompkins Street, it is claimed that the Complainant and its predecessors in title were prohibited from filling in the same or erecting piers or wharves thereon, without permission of the City, and that such permission has never been granted.

It is not deemed necessary to consider the merits of the questions thus suggested. In one form or another they have been frequently before the Courts of this State, but it can hardly be said that the proposition for which the City contends is so decisively settled for all purposes as to admit of no further question. However this may be, it is obvious that the question of Complainant's title cannot be adjudicated in this action. For present purposes it is sufficient if the property is occupied by Complainant under a claim of title and used by it in connection with its business of gas making.

249 This requirement is sufficiently met by the proof. The Tompkins Street land forms a part of Complainant's 14th Street

plant and the Twelfth Avenue land part of its 42nd and 44th Street plant. The Complainant and its predecessors have been actually in possession of the areas in question since 1865 and 1870 respectively. The land has been fenced in and occupied by the Company's plants since at lease those dates, with no apparent question heretofore as to the rightfulness of such occupation. The 14th Street lots are held under deeds made as long ago as 1852, and they are assessed against the Company for purposes of taxation. The Exterior Street property consists solely of land under water adjacent to upland owned and occupied by Complainant as a part of its 111th Street plant. It may be noted also that, even assuming the City's contention to be correct, it would not practically affect the issues involved in this action. Should the Complainant be compelled to vacate the lots in question, upon which are located integral parts of its plants, it would obviously be compelled to acquire land of equivalent area as nearly contiguous as possible. It may well be doubted, in view of the evidence, if such equivalent land could be obtained for a price as low as the appraised value of the land so vacated.

(D) Land Unimproved:

This consists of several different plots, some of which has already been considered in part, under the head of Land Leased.

Block 688, Lot 21. This consists of an entire block between 16th and 17th Streets, Tenth Avenue and Marginal Street, which formerly constituted a part of Complainant's 18th Street station. It is one of the portions left after the condemnation by the City of certain premises required for the opening of Marginal Street. It was valued by Mr. Wells at $300,350, by Mr. Thompson at $382,181.20, and by Mr. Wheelock at $400,000. The evidence shows that the particular tract of which it formed a part originally contained four gas holders and two coal storage yards. The land on which
250 the holders were located was a part of that acquired by the City. No manufacturing is now carried on at the 18th Street station. The land remaining after condemnation, aside from the block now in question, is occupied by six gas holders and buildings for machine shops, stable, and other purposes. It does not appear that this block is any longer required *required* for coal storage, nor for any other purpose in connection with Complainant's gas making business, and Mr. Addicks, Complainant's Vice-President, admitted that it might properly be disposed of. Its value should, accordingly, be deducted from the aggregate valuation of Complainant's real estate employed in the gas making business.

As to the remainder of the property in respect of which a deduction is claimed, part of which has already been considered under Land Leased, the only proof introduced by the City consisted of a statement showing its assessment for purposes of taxation for the year 1906 as vacant land. The mere description of a particular parcel as "unimproved" or "vacant" in an assessment roll is not sufficient foundation for the conclusion that the property is not used by Complainant in its gas making business. It may very well be, and the proof in many instances showed, that the parcels assessed as vacant land were used for purposes necessary in connection with

Complainant's business, as, for example, the storage of coal, coke, pipe fittings, tools, and castings.

(E) Shadyside.

This consists of a large plot situated on the New Jersey shore of the North River having a frontage on the river of nearly 500 feet and a depth of approximately 1500 feet. It is valued by Mr. Wheelock at $300,000 and by Mr. Thompson at $245,000. The property is entirely vacant excepting for an iron runway, running back from the river. The property was used for a great many years as disposal ground for the refuse and ashes of Complainant's various stations, and a large amount of the land was built out in that way.

251 The plot is not now used by the Consolidated Company, but is leased for purposes of coal storage. There is no evidence indicating that it is necessary or likely to be used for any purpose of the Company in connection with its business of gas making, and its valuation should accordingly be deducted from the aggregate valuation of land so employed.

Cost of Real Estate.

It is claimed by the Defendants that the actual cost of Complainant's real estate investment was but $4,118,267.38 and that this is the only fair valuation to be included in the capitalization on which a return is to be based. The difference between such alleged cost and the book value on Complainant's books, as of December 31st, 1905, viz., $10,929,918.28, or its present value according to the appraisal of the experts, ranging from $10,500,000 to $14,500,000 approximately, consists, as it is urged, of an appreciation of value or unearned increment on which the Company is not equitably entitled to a return. Such appreciation amounts to $6,811,650.90, as determined by certain analyses made by expert accountants called by Defendants, which are based chiefly on data derived from the proceedings had before a Committee of the Senate of the State of New York appointed in 1885 to investigate the consolidation and capitalization of the six constituent companies.

In support of their argument counsel have referred to the fact that in cases where the question of cost has been discussed by the Court, it appeared that the original cost was greater than the present value, but has been disregarded in determining the basis of a fair return on the property. Such, for example, is *San Diego Land Company vs. National City*, 174 U. S., 139, in which the Court said:

"The contention of the appellant in the present case is that in ascertaining what are just rates the Court should take into consideration the cost of its plant; the cost per annum of operating the plant,

252 including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to customers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters

ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the Company and to the public."

See also *Stanislaus County vs. San Joaquin C. & I. Co.*, 192 U. S., page 214.

In those cases it was the corporation whose rates were under consideration which made the claim that the actual cost should be considered. It is argued that if the Court refused to allow a return on money actually spent, but spent improperly or improvidently, it could not in reason allow such a return on money which had never in fact been disbursed. It is claimed, in other words, that if when the present value is less than cost the Court has decided that to allow a return only on such present value does not amount to confiscation, it must necessarily follow that where present value exceeds original cost there can be no confiscation if a return is allowed on the original investment.

253 The question thus suggested is largely academic so far as the present case is concerned, for the supposed facts on which it is based are not established by the evidence. There was no competent proof showing that the original cost of the real estate was, as stated, only the sum of $4,118,267.38, and, so far as the record discloses, it is quite evident that the actual cost was in excess of that sum. Defendants' experts derived their information as to its original cost to the constituent companies and the appreciation on its transfer to the Consolidated Company from the report of Mr. Yalden, an expert accountant employed by the Senate Committee. On the face of their analysis no real estate is included as belonging to the Knickerbocker Gas Light Company, and it appears from an examination of the report that the books of the Knickerbocker Company were not before Mr. Yalden. That it owned valuable real estate at that time does not appear to be questioned.

In the second place, if the question of original cost is to be considered, it should be the cost to the Complainant, the Consolidated Gas Company, and not the cost shown on the books of its constituent companies, some of which had acquired their property fifty years and more before the Complainant was organized. The cost to the Consolidated Company was represented by the amount of stock it issued to the constituent companies for their real estate, which, as already stated, was $10,332,000. It may possibly be that this

amount was in excess of the fair market value of the property at that time, but the record indicates that the discrepancy, if any, was by no means as large as the defendants have argued.

In the majority report of the Senate Committee it is said:

"As to the value of the real estate, piers, property and water rights, there is a conflict of testimony. It is a difficult question to determine owing to the varying opinions of real estate dealers."

254 No specific finding was accordingly made on the subject, although the Committee reported that the aggregate value of the real estate and plants given at $29,994,000 was not too high.

The minority report recited that the Committee "had caused every piece of real estate to be appraised by a disinterested witness and had subjected his results to reasonable tests from other witnesses of large experience." As a result it was stated that "the scheduled values of lots designated in the schedules as 'real estate' are about 25 per cent. in excess of what was their fair value in September, 1884, when the agreement of consolidation was signed." Such appraised value having been approximately $10,000,000, it is evident that, even on the basis of the Committee's Minority Report and in the aspect least favorable to the Complainant, the original cost to it could from no point of view be considered as less than about $8,000,000.

Counsel for the City has further claimed that not only is Complainant not entitled as against the consumer to include in its capitalization the appreciation on its real estate, or unearned increment, but that it is to be seriously questioned whether Complainant is entitled to any return whatever on its real estate investment. No argument is advanced in support of this proposition beyond the suggestion that one per cent. over and above taxes has been sometimes regarded as reasonable for a real estate investment and that capital can be found to invest in real estate without expecting any return therefrom excepting by appreciation. There is nothing in the proof to support this contention.

As regards the main proposition that the unearned increment should not be taken into account in capitalization, counsel for Defendants have cited no authorities and their arguments are not persuasive. The cases cited elsewhere clearly indicate that a public service corporation is entitled to demand a fair return upon the reasonable value of its property at the time it is being used for the public. In so far as the question of appreciation has been considered, the expressions of the Courts are adverse to the Defendants' position.

255 It seems to be well settled for example, in the water works cases, that where capital is invested in property for the purpose of supplying a public necessity, if the property "has since enhanced in value, those who invested their money in it, like others who invest their money in other kinds of property, are justly entitled to the benefit of the increased value," in determining a reasonable rate of return upon the investment.

San Diego Land & Town Co. v. National City, 74 Fed., 79, 88; Affd., 174 U. S., 739.

San Diego Land Co. v. Jasper, 110 Fed., 702, 714.

The owner of property devoted to the public use "is entitled to the benefit of any appreciation in value above the original cost and the cost of improvements which is due to what may be termed natural causes," such as "improvements made in the vicinity of the property, the growth of the City or town where it is located, the building of railroads, the development of the surrounding country and like causes." The owner would be deprived of the increased value so produced, "by legislative action which prevents him from realizing an income commensurate with the enhanced value of his property."

Thayer, J., in Cotting v. Kansas City Stockyards Co., 82 Fed., 850, 854.

See also

Metropolitan Trust Company v. Houston and Texas Railroad Company, 90 Fed. Rep., 583.

II.

Plant.

The term "plant" as used in this case includes four classes of items:

(*a*) Buildings and foundations of apparatus, forming part of the manufacturing and distributing stations;

(*b*) Apparatus;

(*c*) Holders; and

(*d*) General connections at the stations.

256 Six of the seven different witnesses called on this subject appraised all four classes of property with the aggregate results below set forth. Messrs. Bradley and Addicks, in testifying, included in their valuations the portion of the 18th Street plant which has been condemned by the City. There has accordingly been deducted from their figures, for the purposes of comparison, Mr. Mayer's valuation of the portion so condemned, which was $1,508,085.

William H. Bradley	$18,321,000.	
Excluding 18th Street condemned		$16,812,915.
Walter R. Addicks	17,640,000.	
Excluding 18th Street condemned		16,131,915.
Alexander C. Humphreys, *Incomplete.*		
Possibly	17,100,000.	
At least		16,400,000.
Frederick J. Mayer	17,040,524.	
Excluding 18th Street condemned		15,532,489.
H. H. Edgerton		10,023,057.25
William D. Marks		9,348,692.

A seventh witness, Mr. Walter H. Logan, confined his testimony to the value of the holders and certain of the apparatus. As to these items his results, as will be noticed later, do not materially differ from those of Mr. Mayer.

Of the above valuations that of Mr. Mayer is, in my judgment, entitled to most weight and may be regarded as representing with substantial accuracy the present value of the property. He is a graduate of the School Technology of Stuttgart, and has been a practicing mechanical engineer for 34 years. For the past 23 years he has been connected with the firm of Bartlett, Hayward & Company, the largest manufacturers of gas holders and apparatus in the country. During that time he has designed and constructed in the neighborhood of 100 complete gas plants and approximately 400 gas holders. A number of Complainant's holders now actually in use in New York, as well as a considerable part of its other apparatus, were constructed under his supervision and he was
257 in charge for Bartlett, Hayward & Company of the construction of a portion of the Astoria plant. He has access to the numerous estimates on the files of his firm made by him or under his supervision for gas holders and miscellaneous apparatus, from which the actual shipping weights can be determined, and from personal experience is fully familiar with the cost of labor, material and construction of both gas apparatus and buildings in the City of New York. The work of preparing his appraisal, including a careful personal examination of the plants, occupied the witness and twelve assistants for a period of six weeks and as was stated by the witness, without the assistance derived from the data in possession of his firm it would have taken many months to make an investigation of equal thoroughness and detail.

Mr. Bradley, the present Chief Engineer of Complainant, has been for over 30 years engaged as a Gas Engineer in the City of New York. Mr. Addicks, the Vice-President of the Company, was formerly Chief Engineer of the principal Boston Companies. Both of these gentlemen, and Mr. Bradley in particular, are fully familiar with the plants of Complainant, including their efficiency and physical condition. Dr. Humphreys, the President of Stevens Institute of Technology, has been continuously engaged in the gas business for some 35 years, both as a Consulting Engineer and in construction, and he is concededly a leading authority on the subject. Complainant's plants were carefully examined by him in the winter of 1905 and 1906 for the purpose of testifying before the Commission on Gas and Electricity. Since that time he has caused a further examination to be made through representatives of his office, in order to check or correct his previous conclusions. None of the three witnesses last named gave detailed valuations of the plants. Their figures were rather in the nature of estimates than appraisals. Although each was well qualified as an expert, their valuations, under the circumstances, are deemed chiefly of value as affording support to the conclusions of Mr. Mayer.

Defendants' witnesses, with the exception of Mr. Logan,
258 showed no especial qualifications to testify as experts on this branch of the case. Neither Mr. Marks nor Mr. Edgerton had recent experience in the construction of gas plants in large cities or showed familiarity with existing metropolitan conditions. The former, some 30 years ago, was connected with the construction of a

plant in St. Louis, but his practical experience in recent years has been limited to small towns in North Carolina. He has never conducted building operations or installed manufacturing apparatus in New York City. This is the case likewise with Mr. Edgerton. His chief connection with practical gas manufacturing, aside from a small plant in Connecticut, appears to have been over 30 years ago. Neither of these gentlemen made a careful detailed examination of the plants, and each frankly stated that the time at his disposal was entirely inadequate for the preparation of an accurate appraisal of values. Making all allowances for any possible predisposition in favor of the Complainant on the part of Mr. Mayer, in view of his past relations with the Company, his estimates are therefore on the whole, to be regarded as the most reliable. As hereafter pointed out, they were corroborated in many particulars by the Defendants' own witnesses and, although subjected to careful examination by the latter and a full cross-examination by counsel, no errors became apparent which would materially affect the general result of his computations.

(*a*) As Regards Buildings:

Mr. Mayer took as his unit similar buildings recently erected by him in the City of New York for the Kings County Gas & Illuminating Company. From such unit figures he computed the values of Complainant's buildings by the method of comparative cubical contents. In his units an ordinary foundation 4 feet in depth was assumed, with proper allowance where foundations were found to be of greater depth or more expensive character. This was determined by careful examination of Compainant's buildings to
259 & 260 determine the exact character of the construction. In the valuation of buildings the foundations of apparatus therein contained were included. The accuracy of a valuation based on cubical contents was tested in several instances by the preparation of detailed estimates of the cost of certain buildings in Complainant's plant and found to be correct. Mr. Marks, although criticising the method of valuation by cubical contents, made his estimates upon the same theory, but does not appear to have made sufficient allowances for the difference in the character of the various buildings. Neither, as a rule, did he make allowance for piling or other expensive foundations. The testimony of Mr. Edgerton as to buildings revealed numerous omissions and inaccuracies. In some instances his figures were based practically on the cost of materials, without including contractors' profit. He likewise omitted in many instances to make allowance for piles or other foundations for the buildings, notwithstanding the ground was of such a character that the expense of foundations formed a very material part of the total cost. In many cases he estimated the cost of materials at very much less than the market prices shown elsewhere in the evidence.

(*b*) As Regards the Holders and Apparatus:

Mr. Mayer had actual measurement made of every article, after which detailed estimates were obtained for the apparatus, showing the exact shipping weights. In the case of articles made by special

manufacturers the values were obtained by getting special estimates. Mr. Marks did not disagree materially with Mr. Mayer in his estimates as to apparatus and holders. In so far as differences appear, they are due chiefly to the fact that Mr. Mayer included the cost of installation, whereas Mr. Marks estimated for what is known as "sidewalk delivery" of the apparatus. Other differences appear in cases where Mr. Marks has assumed a different weight of material. Mr. Edgerton, in valuing the holders, assumed weights which in numerous instances were shown to be erroneous as the exact shipping weights of the particular holders in question were matters of record.

261 *Holders—Valuations of Mayer, Logan, and Edgerton.*

	Mayer, without depreciation.	Logan direct examination.	Logan's values corrected on cross-examination, assuming Mayer's weights.	Edgerton, without depreciation.
14th Street:				
6 holders	$178,885.00	$180,000.00	.....	$146,600
2 "	52,091.00	40,000.00 (a)	$52,091.00	27,360
1 " .... (t)	262,224.00 (t)	225,000.00 (a)	262,224.00 (t)	244,000
18th Street:				
2 "	29,800.00	19,000.00	27,650.00	21,320
4 "	105,378.00	72,000.00	103,600.00	53,000
42nd Street:				
4 "	112,180.00	120,000.00	.....	73,900
44th Street:				
4 "	124,384.00	140,000.00	.....	75,000
1 "	116,646.00	120,000.00	.....	84,000
2 "	36,165.00	36,000.00	.....	25,250
99th Street:				
2 "	119,348.00	70,000.00	.....	54,600
1 "	24,913.00	26,000.00	.....	16,300
1 "	12,271.00	12,000.00	.....	7,350
21st Street:				
4 "	219,400.00	182,000.00 (a)	219,400.00	115,700
1 "	88,752.00	94,000.00	.....	72,000
1 " .... (t)	25,866.00 (t)	37,240.00	..... (t)	16,500
1 " .... (t)	37,176.00 (t)	42,500.00	..... (t)	31,300
63rd Street:				
1 "	160,374.00	160,000.00	.....	129,320
65th Street:				
2 "	57,197.00	52,000.00	56,350.00	32,800
4 "	104,040.00	104,000.00	.....	65,600
2 "	398,645.00	400,000.00	.....	294,000
111th Street.				
2 " .... (t)	611,891.00 (t)	650,000.00	..... (t)	702,000
132nd Street:				
1 " .... (t)	346,915.00 (t)	322,000.00	..... (t)	356,100
Inwood:				
1 "	11,882.00	8,200.00	.....	3,100
Total.....	$3,236,423.00	$3,111,940.00	.....	$2,647,100
Increase on Cross Examination, assuming Mayer's weights....	.....	$131,315 00		
Logan's Total, including corrected items..	.....	$3,243,255.00		

(a)—Mayer's valuation, accepted by Logan.
(t)—Includes Steel Tank.
Where Tank is constructed of masonry, Logan does not value it.

262 Mr. Logan, a witness called by the State, is President of the Logan Iron Works, Brooklyn, with which he has been connected since 1868. His Company builds gas tanks, holders, purifiers, condensers and other apparatus, and does general contracting iron work. In many respects his testimony was confirmatory of Mr. Mayer's estimate. He had not opportunity to measure and secure the exact weight of the apparatus which he valued lower than Mr. Mayer but, on cross-examination, admitted that, assuming the correctness of certain weights suggested to him (and which were those that had been ascertained by Mayer), the latter's figures were substantially correct. The tabulation herewith presented illustrates how nearly the two witnesses in question (both of whom were practical gas constructors) agree in their valuations, and, for purposes of comparison, Mr. Edgerton's values for corresponding items are presented.

(*c*) As to Yard Connections:

Mr. Mayer made his estimate from the exact mileage and size of pipe as existing and in use. Mr. Marks does not appear to have made any examination of such connections, but accepts Mr. Mayer's figures without change. Mr. Edgerton did not undertake to value the connections as they actually exist but assumed the value of connections which he thought might answer Complainant's purposes, if they were to be installed now for plants of the present capacity.

In arriving at his final figures of the value of the plants as a whole, Mr. Mayer adds to the contractor's figures, in the case of the manufacturing stations, 10 per cent., and in the case of the holder stations 5 per cent., to cover engineering and general expenses of the Company. This includes the planning of the works, making of drawings, grading, paving, curbing, sewerage and drain pipes, temporary fences, operating tools and other utensils, inspection and supervision of construction, water for holder tanks and apparatus required for operation of plant, as well as miscellaneous expenses for minor apparatus, connections, etc., which cannot be included in a general schedule. He also adds an interest charge of 5 per
263 cent., covering the entire plant, on the supposition that it would take at least two years to produce the plants as a whole, or, in other words, that there would be an average interest charge of one year at 5 per cent. These expenses amount in the aggregate to $1,939,132.00. That expenses of this character are properly to be included as a part of the cost of construction is a *a* matter of common experience and has been recognized in a recent proceeding analogous to the present case (*Columbus Railway & Light Company v. City of Columbus, post*). The allowance of 10 per cent. for engineering and miscellaneous expense does not appear excessive upon the evidence, which indicates that as high as 15 per cent. is sometimes allowed for this purpose. In assuming a construction period of at least two years for the entire plant, Mr. Mayer is supported by Mr. Logan as well as by Complainant's experts, although Mr. Logan expressed the opinion that the largest of the holders should be built in from 9 to 10 months, and the smaller

one in about 4 or 5 months. Mr. Edgerton allowed 3 per cent. for engineering and contingent expenses, although computing it not on the original cost of construction but on his estimate of the present value of the property as depreciated. His estimate of 3 per cent. is based upon the amount which he assumes to have been expended for similar purpose in the construction of the Astoria plant, hereinafter described but it was shown that such assumption was erroneous, as Mr. Edgerton took into account only a small portion of the expenditures of this character which passed through Complainant's books, while the actual engineering and miscellaneous expenses have amounted thus far at Astoria to upwards of 11 per cent. As to interest, he appears to have allowed at the rate of 5 per cent. and a construction period of somewhat less than two years. Mr. Marks made no specific allowance for either of these items, stating that although proper to do so in making estimates it is not customary in the case of inventories of apparatus already erected. But
264 obviously they are a necessary part of any estimate of reproduction cost, as Mr. Marks admitted.

Having thus obtained his total cost, Mr. Mayer made deductions for depreciations based on an examination of each individual item upon which it was computed. Such deductions represented his estimate of what would be required to place the plant in every respect in condition as good as new, and amounted in the aggregate to $604,988.

The examination made by Mr. Edgerton was of such a cursory nature that his figures for depreciation were necessarily made less carefully. In one case, for instance, he ascribed the same depreciation, 10 per cent., to new apparatus installed in 1904-5, as to old apparatus installed 15 or 16 years earlier.

Mr. Marks did not particularly regard the extent of depreciation actually existing, but assumed a theoretical deterioration of the supposed life of the plant.

He testified:

"Depreciation results from several causes. The most ordinary one is decay or wear and tear, as observed. There is another factor which is inadequacy, owing to the increase of the business. There is also another cause of depreciation, obsolescence, which is due to the changes in the arts and in the methods and in the general growth of scientific knowledge; if a works built at a certain period is kept in perfect repair, meaning by that, always restored to their original condition, and in good working condition, there remains, assuming that, a depreciation due to both obsolescence and to inadequacy."

In this view he made estimates on the theory of the cost of final replacement to cover such inadequacy or obsolescence, ranging from 25 per cent. to 60 per cent. and based on a supposed life of 120 years for the plant. The discrepancy between his valuations and those of Mr. Mayer is largely due to their different methods of estimating depreciation. He said:

"Mr. Mayer does not differ largely from my now figures of struc-

tural cost. You may say for all ordinary purposes they co-
265 incide, with the exception of the gas holders and even there they do not differ largely. It is the question of depreciation entirely."

As will hereafter appear, it is proper in the administration of a manufacturing plant to take depreciation of the character above described into account and provide against it by setting aside a reserve fund from current earnings. For the purpose of determining present value, however, particularly on the basis of cost of reproduction, the method followed by Mr. Marks does not commend itself. It appears from the record, without substantial dispute, that while certain of the plants and apparatus may not be in perfect repair, they are, as a whole, in efficient operating condition, and that a large proportion of their capacity is represented by the latest pattern of water gas apparatus installed within the last few years. The books show expenditures, since November, 1885:

For renewals offsetting depreciation by loss or abandonment	$1,227,683.10
For repairs to buildings	1,275,749.03
For repairs to apparatus	4,865,362.51
New construction	3,904,937.31
Total	$11,273,731.95

The fact thus being that the plants are in good order and operating efficiently, it does not appear reasonable, for the purposes of this case, to charge them with a theoretical deficiency so great as, if actually existing, would make their successful operation a practical impossibility. An estimate of depreciation like those of Mr. Edgerton and Mr. Mayer, based on a detailed examination of the property as it stands to-day, affords in my opinion a more fair and practicable method to be followed in determining its value.

I accordingly find and report the value of the Complainant's plants to be substantially in accordance with the estimate of Mr. Mayer, a summary of which is given below but adopting, for purposes of convenience and to allow for posslbie over-valuation
266 in some details, the round figure of $15,500,000 instead of $15,532,489, as shown by the appraisal.

Valuations of Plants and Holder Stations, Depreciation Deducted.

21st	Street	Plant	including	all	Holders		$4,162,021.00	
44th	"	"	"	"	"		2,000,205.00	
99th	"	"	"	"	"		963,011.00	
14th	"	"	"	"	"		2,549,545.00	
42d	"	"	"	"	"		1,744,660.00	
18th	"	"	"	"	"		588,873.00	
Total for all plants								$12,008,315.00
63rd	Street	Holder	Station	Complete			$490,072.00	
65th	"	"	"	"			1,427,317.00	
11th	"	"	"	"			1,039,910.00	
132nd	"	"	"	"			540,702.00	
Inwood	"	"	"	"			26,173 00	
Total for all Holder Stations								$3,524,174.00
Total for Plants and Holders now in use								$15,532,489.00

This may be fairly said to represent the cost of reproducing the property as it stands. In this instance, as well as regards the three items next to be considered, such reproductive cost affords the only practicable basis of present valuation. While the real estate has a substantial value irrespective of the purposes for which it is now held, the plants, mains, etc., are of value only when used by a going concern. For any other purpose they are merely scrap, or second hand machinery, and their intrinsic worth is inappreciable. As to their market value, there is no means of judging. Dr. Marks, it is true, testified that his valuations were made from the standpoint of an intending purchaser desiring to take over the plants and operate them as a whole. But any such purchaser in order to continue business must own Complainant's franchises in addition to its tangible property, else the tangible property would have no substantial value. (*People ex rel. Consolidated Gas Co. vs. State Board, &c.*, 174 N. Y., 417, 440.)

There is no evidence as to the market value of any of Complainant's property taken in connection with its franchises, and disposed of as part of a going concern. Furthermore, it is clear that
267 a valuation that might be proper as between purchaser and seller would not necessarily be a fair one for the purposes of the present case. The evidence shows without contradiction that capitalists purchasing entire gas properties expect a return on their investment of at least 10 or 15 per cent., which much exceeds any rate conceded by Defendants to be a proper return to Complainant. On the other hand, a capitalization on the basis of reproductive cost seems fair to all parties. Complainant receives a return on the present value of its property as used, while the consumer pays no more than he would be required to pay had Complainant abandoned business, or a new company entered the field as its competitor.

III.

Mains.

Respecting the value of Complainant's mains, there is not such a wide variance in the figures of the witnesses as was shown in the case of real estate and plant. The evidence shows that on October 31st, 1905, Complainant's mains of various sizes amounted in the aggregate to 822 miles, exclusive of 70 or 80 miles of abandoned mains. They are carried on the Company's books at the sum of $7,852,000, which, according to the testimony of Dr. Humphreys and of Mr. Simpson, Complainant's superintendent of Mains, is a low estimate for original cost. Mr. Marks figured (City's Exhibit 89, page 1581,) that their total cost, minus an assumed contractor's profit of 15 per cent., was $7,141,231.51. It was shown by the Complainant that mains of the aggregate value of $2,891,690.22, at Mr. Marks' prices, had in fact been laid by contract. A computation of the 15 per cent. contractor's profit suggested by Mr. Marks, would accordingly add $433,753.53 to his cost valuation. It was further shown that his estimates were based on an assumed mileage, very much less than actually exists.

268 As to the present value of the mains based on the cost of reproduction, Mr. Simpson testified that a conservative estimate would be $12,636,000. This was supported by Dr. Humphreys. Mr. Marks stated that he had checked Mr. Simpson's estimate which seemed to him moderate and fair, though unnecessary. His own statement of reproduction cost, as finally presented in the City's brief, after certain corrections of his previous figures, is $6,529,035, made up as follows:

Actual structural cost of street mains (City Exhibit 89, corrected)		$7,518,603.
Deduct:		
Cost of 632,553 feet of 6-inch mains under new pavements	$1,674,843.	
Cost of 632,553 feet of removed 2-inch, 3-inch, 4-inch and 5-inch mains	637,825.	
		1,037,018.
		$6,481,585.
Add:		
Cost of mains in Bronx (Comp. Ex. 91, services)		47,450.
		$6,529,035.

The deductions made from the actual structural cost are, as appears from the record (page 5108), in the nature of an allowance for obsolete mains, the grounds for which do not clearly appear.

Mr. Edgerton, on behalf of the State authorities, computed the present value of the mains at $8,919,792.55. Cross-examination developed, however, that this estimate was made without knowledge or practical experience of conditions existing in New York. When revised to conform to such conditions his estimate of reproductive cost would equal, if not exceed, that of Complainant's witnesses. For example, he assumed an insufficient depth and width of trench, a lighter weight of pipes than those actually in the ground and those used elsewhere; cost of excavation and materials less than
269 those now prevailing in the market; and a cost of re-laying pavement under that which is paid by the Complainant under the regulations of the City. No allowance was made for sheathing, which is used to a very large extent, nor for blocking and wedges used under the mains, nor for the bridging of street crossings.

The fact that reproduction cost is so greatly in excess of the cost of original construction is due largely to changes in the character of the City's pavements. Formerly, when the gas companies had occasion to open the streets for the purpose of laying new mains or repairing old mains or services, it was their custom to replace the pavement at a cost of from 15 to 25 cents per square yard. Now about 88 per cent. of the streets are covered with new styles of pavement, chiefly asphalt. The gas companies are permitted to open the streets only on condition that the pavements shall be relaid by

the contractors for asphalt paving. The expense of this work is paid by the gas companies and amounts to from $2.70 to $7.00 per yard, the latter price being for pavement on Broadway. Pavements consisting of granite blocks on concrete are replaced by the City's employees, and for this work the Complainant is charged $8.00 for the first square yard and $4.00 for each additional yard. Another source of additional cost is the congested condition of the sub-surface of the streets, in view of the multiplication in recent years of various forms of underground construction. In addition to sewer and water mains there are now conduits for electric light, telephone and telegraph wires, underground trolley ducts, and salt water mains, besides, in certain streets, the elevated railroad columns, and structures of the rapid transit railway. The result is that in many streets the entire sub-surface is so filled with these structures that the replacement or repairing of existing mains is attended with great difficulty and consequent expense.

Taking the testimony on this subject as a whole, the preponderance of evidence is very clearly with the Complainant, and its estimate of the replacement value of the mains may be taken as reasonable.

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IV.

Services.

These are carried on the Company's books at the sum of $1,212,000. Mr. Simpson and Dr. Humphreys testify that this is a low estimate of the original cost of installation, and Mr. Marks admits that such valuation is moderate and fair. In the report of the City's expert accountant, the capital invested in services as shown by the books as of December 31st, 1905, is $1,222,228.37, and this figure is adopted by counsel for the State and City in their briefs. The cost of reproducing these services at present prices, according to Complainant's witnesses, would be $1,994,000., and the record discloses no testimony to the contrary.

It is urged by the counsel for the State authorities that the appraised value of both mains and services at the time of the consolidation in 1884 was far in excess of their cost, and a computation is made showing that the value of the mains and services devoted by Complainant to the public use, as of December 31st, 1905, was but $6,359,324.46, "which represents the original cost of mains and services transferred by the constituent companies to Complainant, plus the expenditures of Complainant since 1884 on account of new construction thereof." This contention is without force, for the reason that it clearly appears that the term "cost of property", as used by the expert accountant, whose tabulations form part of the report of the Senate Committee of 1886, did not represent the actual cost but the amount at which the properties were carried on the books of the constituent Companies, so far as they were before him. In many instances the figures thus appearing on the books were reached after charging down as depreciation very large sums which represented the actual cost. Such charging down was in addition to and ex-

clusive of expenditures for current repairs and renewals necessary to keep the plants of the Companies in efficient condition. For example, in the case of the Manhattan Company, it appears that during a period of 10 years there was written off on account of
271 mains, meters and services alone the sum of $768,517.96, while during that period the additions to those accounts amounted to but $147,630.70.

As regards mains and services, therefore, as well as real estate and plant, it does not appear that any sufficient ground exists for the suggestion that the appraisal value of 1884 was materially less than the actual cost of the tangible property to the Complainant.

V.

Meters and Miscellaneous Personal Property.

This item covers not only meters, meter cocks and connections, but scows, horses, wagons and harness, furniture and fixtures, gas stoves, tools, implements, etc. They are carried on the books of the Company at the sum of $3,802,544.50. This is the original cost of the property, practically all of which has been acquired since the consolidation in 1884. The present value of the property, based on the value of reproduction, is stated to be $4,100,000., according to an estimate made by Mr. Carter, Complainant's Secretary. These valuations were not contradicted by the Defendants.

VI.

Working Capital.

This is found in the shape of current supplies, cash and bills and accounts receivable. According to Mr. Carter, Complainant's material and supplies, consisting of coal, coke, oil, lime, etc., aggregated $616,470.08, as of October 31, 1905. In addition to this he testifies that $1,000,000 in cash was a fair conservative amount of working capital for the current purposes of a Company like Complainant, besides its accounts receivable outstanding to the extent of $2,000,000. His total estimate, therefore, aggregates $3,616,000. Dr. Humphreys testified that a fair allowance for working capital, including cash, accounts receivable and material, would be
272 about $0.30 per thousand cubic feet of annual sales. On the basis of annual sales amounting to 13,283,000,000 feet (the Complainant's sales for 1905), this would represent a working capital of $3,984,900.

Mr. Marks testified that, in addition to fixed or structural assets, a certain amount of capital is required for operating the works. He did not give his own views as to the proper amount, but stated that it bore a certain relation to the annual sales of gas. He accordingly selected four Massachusetts Companies, which he stated formed a group resembling very closely Complainant's five stations in the Island of Manhattan, and, on the basis of their annual sales, computed that the amount of capital actually necessary in their business was $0.13 per annual thousand feet of gas sold. Multiplying this

by the annual sales of the Complainant for 1905, he obtained the sum of $1,726,811.32, as the proper amount of "actual capital furnished or quick assets" for the Complainant company. It appears, however, from the reports of the Massachusetts Gas Commission that there are included as a part of the capital of the Companies in question certain notes payable, which the witness had omitted in his computation. As corrected it appeared that the Massachusetts Companies were employing about $0.48 per thousand feet for their active capital and, on a like basis, according to Complainant's sales a proper working capital would be upwards of $6,000,000.

Although the necessity for working capital is conceded by the witnesses for the City, the subject is not discussed at length in counsel's brief excepting that in summarizing the cost of property devoted to the gas business, there is included $1,303,000, being the same amount set aside for working capital at the time of the consolidation in 1884. No testimony on the subject was offered by the State authorities and counsel in their brief include no allowance for working capital in their statement of the maximum amount which they claim as the value of Complainant's property devoted to the public use on December 31st, 1905. As the sales of gas for
273 1885 were approximately 4,000,000,000 feet as against approximately 13,000,000,000 feet for 1905, it is manifest that a much larger working capital is now required than that conceded by the City, and nothing is found in the evidence to justify the conclusion that the sum of $3,616,000, claimed by Complainant, is excessive.

VII.

National Coal and Coke Company.

This company, the capital of which is $50,000, was organized by Complainant for the purpose of conducting the business of carting the coke made at the various plants. All of the stock is held by Complainant, which paid for it in cash at par. Before the organization of the company the carting of coke was done by contractors and it was believed that by having it done under its own supervision, economies would be effected. The proof indicates that such has been the result. The profits resulting from the company's operations are paid to the Complainant in the form of dividends. As the carting of coke is a necessary incident to the disposition of one of Complainant's residuals, there is apparently no reason why the amount invested as above should not be regarded as part of Complainant's capital on which it is entitled to a return. This does not appear to be seriously questioned so far as the record discloses, although this item, like the preceding, is not covered by any allowance in the assets conceded by Defendants' counsel.

VIII.

Astoria Plant.

In the year 1900, after examining a number of other sites that had been suggested, the Complainant secured a tract of land, some 376

acres in extent, at Astoria, in the County of Queens, and shortly afterward commenced work preparatory to the erection of a large gas plant thereon. The plans contemplated the construction of
274 works capable of producing when completed 240,000,000 feet of gas per day, and consisting of 12 separate units, each of which is to have a maximum daily capacity of 20,000,000 feet. Work was begun upon the first unit in 1902 and it was completed and in actual operation during the progress of the hearings in the present case, the first gas having been delivered on the 3rd of December, 1906. Mr. Bradley, the Complainant's Chief Engineer, testified that the project of removing its manufacturing plants to some point outside of New York City had been urged by him in his annual reports for a number of years; that it was his intention gradually to supplant the manufacturing establishments in New York by the Astoria plant, reserving the holders, however, in the Borough of Manhattan, and building additional ones hereafter. He stated that the manufacture of gas in New York City was attended with more expense than in a place like Astoria, for the reason, among others, that the objectionable features of a gas plant located in a crowded residential locality gave rise to difficulties with the Board of Health, the Building Department and other City Bureaus; also because that, owing to the limitation in the size of City block, it was not practicable to obtain a sufficiently large area of land to construct a plant of the size desired in modern construction. The first unit occupies a strip of land approximately 2,000 feet long by 350 feet wide, or in the neghborhood of 12 acres and the holder already constructed, which is stated to be the largest in the world, has a capacity of 15,000,000 feet. The gas is conveyed through a 5-foot main to the Ravenswood plants of the New Amsterdam Company, a corporation controlled by the Complainant. From Ravenswood it is taken through the New Amsterdam Company's tunnel under the East River to Manhattan. Ultimately it will be conveyed under the East River through a tunnel constructed for the Astoria Company.

Mr. Bradley said:

"I have endeavored in the designing of the Astoria plant to put in everything that in my judgment would be advantageous
275 to bring about a decreased cost of gas. There is some machinery put there that is not in any of the other plants, some that will be put in no other plant in this country, and my endeavor has been to build an up-to-date plant and the best plant possible to be produced."

The estimated cost of the first unit was $13,134,519.65, composed as follows:

Grading and filling and excavating including Winthrop Avenue	$317,543.53
Dredging	160,000.00
Wharves	190,000.00
Coal and coke handling plant	700,000.00
Inclined retort house	1,400,471.92
Horizontal retort house	1,191,232.29
Purifying houses and contents	608,745.70

Boiler plant	$49,717.31
Exhauster house and contents	47,730.06
Condensing plant	599,981.81
Land drainage	50,000.00
General gas connections	40,000.00
Tar and ammonia separation and storage	40,000.00
Water supply	20,000.00
Meter house and contents	65,560.44
Holder	640,800.00
Holder tanks	460,000.00
Tunnel under Ward's Island exclusive of lining	2,050,000.00
Electric power plant	160,000.00
Gas pumping plant at Astoria	90,000.00
Office	50,000.00
Shops	40,000.00
Foundry, not included, first units, in this item. Soundings and borings	200,000.00
Fences and temporary structures including salt water plant	50,000.00
By-product plant not included in these figures. Undistributed expense 10 per cent	932,178.31
Total	$10,253,961.37
The 60-inch main with gas pumping plant	620,000.00
Total	$10,873,961.37
276 Real Estate	1,132,558.28
Lining of tunnel	600,000.00
Coal shed	400,000.00
Cement for two gas holder tanks	98,000.00
Overhead gas mains and apparatus between retort house and exhauster house	30,000.00
Estimated cost of first 20,000,000 cubic foot unit	$13,134,519.65

In addition to the above items, there are others amounting approximately to $2,500,000, for work yet to be done, nearly one-half of which, according to the testimony, it will be necessary to include in the additional cost of the first unit before it is finally completed. The remainder may or may not be necessary as the construction develops. If, in addition to the foregoing, there be included interest in course of construction, stated to amount to $1,081,711.14, the total cost of the first unit, including land and tunnel, and allowing $1,000,000 for work yet to be completed, would be the sum of $15,216,230.79. Obviously, however, a portion of the cost of land and tunnel is chargeable to additional units which may hereafter be built. The witness testified that the building of a smaller tunnel would have been very bad business judgment, as it is difficult and, in the case of a tunnel containing gas pipes, dangerous, to enlarge a tunnel when once constructed, and that the construction of a new tunnel would be preferable to enlargement. He estimated that the cost of a tunnel capable of carrying the product of the first unit

would be about one-half of the present tunnel, or, say, $1,325,000. Assuming the proper allowance for the land occupied by the first unit to be one-twelfth of the entire price of the land, or, approximately, $100,000, and deducting cost of land and tunnel as thus adjusted from the total expenditures made or incurred, there remains as representing the cost of the first unit the sum of $13,791,-
230.79. This is, no doubt excessive, for it is probable that
277 certain of the work of grading, filling, dredging etc., as well as a portion of the interest accruing during construction, is properly attributable to the units hereafter to be constructed, but the evidence affords no sufficient basis for a finding in that respect.

Making due allowance for this fact, however, it seems reasonably certain from the figures of cost above given, which were not disputed, that Complainant's claim for an allowance of $12,000,000 as its investment in the Astoria plant is not excessive. This investment is represented by its ownership of the entire capital stock of the Astoria Light, Heat & Power Company, together with its first mortgage bonds and promissory notes to the aggregate amount, as carried on its books, of $7,010,000. In addition to this it is a creditor of the Astoria Company for advances made in the course of construction, which are carried in open account.

It is argued on behalf of the Defendant, The City of New York, that this investment should not be treated as property upon which at its fair value Complainant is entitled to earn a reasonable profit, for the following reasons:

"1. The construction of the said manufacturing gas plant and all the operations there carried on is the business not of the Complainant but of the Astoria Light, Heat & Power Company, and the fact that the Complainant is the owner of the outstanding stock of the said Company is not sufficient warrant for any treatment of the operations of the said Astoria Company as if they were Complainant's own.

2. Even if the operations at Astoria, involving the expenditure of a score of millions of dollars were regarded purely as Complainant's own and were so carried upon its books of account, there would be no propriety in its claim to earn a profit upon such investment until the completion of the plant and its product came into the market for sale. The correctness of this proposition is so elementary in its nature that we do not deem it necessary to do more than to state it."

As to the first objection, there would seem to be no ground,
278 for the purposes of the present inquiry, for drawing any distinction between a plant built and operated directly by Complainant and one built and operated by a subsidiary corporation of which it owned the entire capital stock. No reason is apparent why the capital invested in the plant of such subsidiary corporation is not to be treated precisely as if invested in any of the manufacturing stations of Complainant on Manhattan Island, or like the capital invested by Complainant in the National Coal & Coke Company.

The second objection suggests a question which requires a consideration of Complainant's relations with other Gas Companies in

the City of New York whose product forms a part of its annual output. The Complainant owns about 99 per cent. of the capital stock of the New Amsterdam Gas Company, about 51 per cent. of that of the New York Mutual Gas Light Company, and about 92 per cent. of that of the Standard Gas Light Company, which is carried upon its books at the respective valuations below stated:

New Amsterdam Gas Company	$4,814,608.03
New York Mutual Gas Light Company	5,703,290.65
Standard Gas Light Company	14,587,495.25

All of the above companies operate in the Borough of Manhattan. The Central Union Gas Company, and Northern Union Gas Company, operating in the Borough of the Bronx, are owned or controlled by the New Amsterdam Gas Company, which holds the entire capital stock of the former and about 56 per cent. of the stock of the latter. These five corporations and Complainant comprise all the Companies engaged in the manufacture of gas in the Boroughs of Manhattan and the Bronx. For some time past it has been the custom of the Complainant to obtain gas from certain of these corporations, which is delivered into the holders or mains of Complainant in any part of the City as it may be required. The gas so delivered is measured as furnished, and paid for in due course under the terms of certain so-called agency agreements, generally similar in their terms, which have been place in evi-
279 dence. In the case of the New York Mutual Gas Light Company, for example, the agreement provides that the Complainant employs the latter Company as its agent "to manufacture, pur-
" chase and deliver to it for the term of five years such illuminating
" gas and illuminating power required by the laws of the State of
" New York as it may require during each year for the said term
" of five years, estimated to be equal to at least 100,000,000 cubic
" feet per year, and to deliver the same to the gas holders, mains or
" meters of the Consolidated Gas Company of New York in such
"quantities and at such times as may be reasonably required by it."

The agreement further provides as follows:

"II. The New York Mutual Gas Light Company shall, as agent for the Consolidated Gas Company of New York, and at reasonable rates, purchase all the constituent materials and furnish the labor necessary to such manufacture, production and delivery, and employ in such manufacture, production and delivery its own plant and appliances.

III. At the expiration of each month, the New York Mutual Gas Light Company shall render to the Consolidated Gas Company of New York an account of all expenditures for constituent materials and labor made by it as aforesaid during such month, and the Consolidated Gas Company of New York agrees to pay to the New York Mutual Gas Light Company, within ten (10) days thereafter the amount due, according to such accounts, together with an additional ten per cent. (10%) thereof, which shall be in full for its services and the use of its plant and appliances during the said month."

The gas purchased under the above arrangement for the nominal year ending October 31st, 1905, aggregated, approximately 3,000,000,000 feet. The entire sales of the Complainant for the year 1905 aggregated 13,283,000,000 feet, so that the amount purchased constituted about 22% of Complainant's entire output.

In estimating the amount of capital invested in gas
280 manufacture upon which Complainant is entitled to a return, the capital required for the production of this 3,000,000,000 feet of gas has not been specifically appraised by any of the witnesses and manifestly is not susceptible of exact determination. Obviously, however, it must be taken into account in some form, for the Complainant is quite as much entitled to a return upon its capital employed in the purchase and distribution of gas made by some outside company as on capital employed in the manufacture of gas at its own works. The relations of Complainant with the companies in question are entirely different from its relations with the Astoria Company and National Coal & Coke Company, of which it owns the entire stock. While it holds the practical control, it does not own them in a legal sense, and, in the case of the New York Mutual Gas Light Company, there is a very substantial outstanding minority interest.

The producing capacity of the first Astoria unit (20,000,000 feet per day), is equivalent to 4,000,009,000 feet per annum, or about 1,000,000,000 feet more than the gas actually purchased from these companies during 1905. The maximum daily output of Complainant during 1905 was about 70,000,000 cubic feet, while the maximum capacity of its own plants was but 51,000,000 feet. Adding to this the maximum capacity of the first Astoria unit, would give a maximum daily capacity of 71,000,000, or only 1,000,000 more than Complainant's maximum daily output. This surplus, according to the testimony of Mr. Bradley, which was uncontradicted, is insufficient for purposes of a reserve. He stated that, in his opinion, it was not safe to operate gas plants for lighting large cities like New York with less than 20 per cent. reserve of their manufacturing capacity.

Furthermore, with an output so closely approximating the maximum daily capacity, it is clear that no allowance is made for increased sales of gas consequent on the growth of population. That such increase is to be naturally expected is conceded by all parties.

It appears, therefore, that the amount of gas to be produced
281 by the first unit of the Astoria plant is under, rather than over, what was actually required in addition to Complainant's own output to meet the reasonable demands of its business in 1905.

In default of any better method of estimating the amount of capital employed in the production of the 3,000,000,000 feet of gas purchased by Complainant in 1905, it seems entirely proper to measure it by the standard of the known cost of the Astoria first unit. Equipped as it is with the most modern machinery and located on a site much less expensive than could be procured on Manhattan Island, the cost of the first unit seems a perfectly fair and

safe basis of valuation. Mr. Marks concedes the propriety of an allowance for the cost of producing the gas purchased in 1905, and admitted that it made no difference whether the source of the gas so purchased was located in other Manhattan plants or in Astoria. He computed its value at $5,096,000, on an assumed cost of only $1.78 per thousand cubic feet of annual capacity, but this would appear to be inadequate. The testimony of other witnesses indicates that a coal gas plant would cost more than double that amount to construct.

I, therefore, allow Item No. 8 as claimed by Complainant, although, as the Astoria plant was not in operation and delivering gas in 1905, such item should, for the sake of accuracy, be designated as "Property of other companies employed in the production of gas delivered by them to the Complainant."

IX.

Franchises.

As already stated, the Act of 1884, under which Complainant was organized, authorized the constituent Companies to fix in their agreement of consolidation the amount "of the capital of the new Company and the number of shares of stock into which the same
282 is to be divided," and it provided that the amount of capital so fixed in the agreement "shall not be larger in amount than the fair aggregate value of the property, franchises and rights of the several Companies thus to be consolidated."

The value assigned to "franchises and rights" at the time of the consolidation was $7,781,000, and they are still carried for this amount on the books of the Company. The stock issued in payment therefor was apportioned between the constituent Companies as follows:

New York Gas Light Company	$1,417,000
Manhattan Gas Light Company	2,329,000
Metropolitan Gas Light Company	1,863,000
Municipal Gas Light Company	1,175,000
Knickerbocker Gas Light Company	528,000
Harlem Gas Light Company	469,000
	$7,781,000

The proof shows the following facts regarding the franchises of these Companies:

The New York Gas Light Company was incorporated by Chapter 85 of the Laws of 1823, passed March 26th, 1823, which provides that certain persons therein named were constituted

"a body politic and corporate in fact by the name of the 'New York Gas Light Company,' and by that name *they and their successors may have perpetual succession* * * * The said corporation shall have full power and authority to manufacture, make and sell gas

to be made of coal, oil, tar, peat, pitch or turpentine or other materials; and to be used for the purpose of lighting the said city or the houses thereof and any buildings, manufactories or houses therein contained and situate. * * * *And provided also* that no public street, lane or highway in the City of New York *shall be dug into* or in any wise injured or defaced without the per-
283 mission of the corporation of the said city first had and obtained."

By agreement dated May 12th, 1823, between the Mayor, Alderment & Commonalty of the City of New York and the New York Gas Light Company, there was granted to the

"said parties of the second part, and their successors, all and singular the sole and exclusive privilege and right *of laying or placing underground pipes* in all and every of the public streets and parts of streets of the City of New York lying and being south of a line commencing at the East River at the foot of Grand Street, and running through Grand Street to Sullivan Street, and through Sullivan Street to Canal Street, and through Canal Street to the North or Hudson River, for conducting gas, for lighting the public lamps in the streets and parts of streets south of said line, and the houses and buildings fronting, or to front on, or bounded by or adjacent to, the streets or parts of streets south of said line. To have and to hold and to enjoy the same unto the said parties of the second part, and their successors, from the day of the date of these presents for and during and until the 12th day of May, which will be in the year of our Lord one thousand eight hundred and fifty-three."

It is further provided in the grant that if the parties of the second part should not faithfully perform all of the conditions therein contained,

"then and in that case it shall and may be lawful for the said parties of the first part in common council convened by resolution and order to annul and vacate this grant, and thereupon the premises hereby demised shall be revested in the said parties of the first part, or their successors, as fully and completely as if this indenture had never been executed."

284 The Manhattan Gas Light Company was incorporated by Chapter 59 of the Laws of 1830, passed February 26th, 1830. The individuals named in the Act were declared to be a body politic and corporate,

"with full power and authority to manufacture, make and sell gas to be made of coal, oil, tar, peat, pitch and turpentine or other materials, and to be used for the purpose of lighting the City of New York or the streets thereof and any buildings, manufactories or houses therein contained and situate, *and to lay pipes for the purpose of conducting the gas* in any of the streets or avenues of the said city * * * and that no public street, lane or highway in the City of New York shall be *dug into,* or in any way injured or defaced without the permission of the corporation of said city first had and obtained."

By agreement dated May 8th, 1833, between the Mayor &c. and the Manhattan Gas Light Company, there was granted to the latter, "and their successors, the privilege or right *to lay or place underground pipes* in any and all of the streets, avenues and public places of the City of New York, comprised between a line commencing at the East River at the foot of Grand Street and running through the middle of Grand Street to Sullivan Street and through the middle of Sullivan Street from Grand Street to Canal Street, and through the middle of Canal Street from Sullivan Street to the North or Hudson River and a line commencing at the East River at the foot of Forty-second Street, on the north side thereof, and running parallel with said street to the North or Hudson's River and embracing both sides of said street, and in any or every part of any such street, avenue or public place, for the purpose of conducting gas, commonly called inflammable gas, for lighting the public lamps in said streets * * * and for lighting the houses
285 or buildings fronting or to front on or bounded by or adjacent to the said streets * * * To have, hold, use and enjoy the said right and privilege unto the said parties of the second part, and their successors, from the day of the date of these presents until the 12th day of May, which will be in the year of our Lord one thousand eight hundred and fifty-three."

The agreement further contained a clause providing for revocation in case of non-performance by the Company, in a form similar to that used in the grant to the New York Gas Light Company, *ante*.

By agreement between the same parties, dated May 5th, 1848, similar in its terms and provisions to the one just above quoted, there was granted to the Manhattan Gas Light Company the privilege of laying underground pipes within an enlarged area, such privilege to continue unto the 5th day of May, 1868.

The Metropolitan Gas Light Company was incorporated by Chapter 545 of the Laws of 1855, passed April 7th, 1855, by which the individuals therein named and their present and future associates were constituted a body politic and corporate,

"with full power and authority *at any time hereafter* to manufacture, make and sell gas to be made of coal, oil, tar, peat, pitch or turpentine or other materials * * * *and to lay pipes for the purpose of conducting the gas in any of the streets, avenues, lanes, alleys and squares of the said city* * * * and also that the said Company will so conduct their manufactory or manufactories of gas as not to create a nuisance, and that no public street, lane, alley, square or highway in the said city shall be *dug into* or defaced or other means adopted in regard thereto for the purpose aforesaid, without the permission of the two Boards of Common Council of the said city first had and obtained; and the said Boards are
286 hereby authorized to grant and vest exclusive permission and authority to and in said Company for said purposes to such extent and under such regulations as to them shall seem expedient, and such permission and authority shall be conclusive and shall

continue as thus fixed during the period designated by said Boards at the time of granting the same."

By resolution of the Boards of Aldermen and Councilmen, adopted respectively December 21st and 22nd, 1858, it was provided:

"That permission be, and the same is hereby, given to the Metropolitan Gas Light Company of the City of New York, *to lay pipes* for conducting gas through the streets, avenues, lanes, alleys, and squares in said city for the period of thirty years, to be subject to the same restrictions as to the mode of laying down said conductors as apply to and govern the New York and Metropolitan Gas Light Companies in that respect."

The Harlem Gas Light Company was incorporated in 1855 and its certificate of incorporation, executed on February 1st of that year, provided that the term of existence of said corporation should be fifty years.

By resolution adopted by the Boards of Aldermen and Councilmen respectively on the 26th day of March and 23rd day of April, 1855, there was granted to the Harlem Gas Light Company the consent of the Mayor, Aldermen and Commonalty of the City of New York, to lay conductors for conducting gas through the streets, avenues, lanes, alleys and squares in all that portion of the city lying north of the center line of 79th Street for the purpose of supplying gas to public and private buildings," on various terms and conditions named, among which was the following:

"Third. The Mayor, Aldermen and Commonalty of said
287 City hereby reserve the right to purchase at any time from the said Company all the materials, pipes, fixtures, buildings and all and singular all the personal and real property owned by said Company by paying to the said Company the cost of the same and 10 per cent. over and above the said cost."

The Municipal Gas Light Company was incorporated under the name of Municipal Oxygen Gas Company, under the provisions of the Act entitled, "An Act to authorize the Formation of Gas Light Companies," passed February 16th, 1848, and the several Acts amendatory thereof. By order of the Supreme Court entered June 5th, 1876, the name of the corporation was changed from Municipal Oxygen Gas Company to Municipal Gas Light Company of New York. The certificate of incorporation, executed May 29th, 1874, provided that the term of the existence of the Company should be fifty years.

By resolution of the Common Council, adopted December 21st, 1876, it was provided:

"Permission be, and the same is hereby, given to all incorporated gas light companies to lay gas mains and pipes in the streets, avenues and public places in this city for the purpose of supplying gas to this city and its inhabitants upon such conditions as may be prescribed and approved by his Honor, the Mayor, the Comptroller and the Commissioner of Public Works, who are now by law authorized to make provision for lighting the streets of this city."

Thereafter and on the 22nd day of March, 1877, an instrument was executed by the Mayor, Comptroller and Commissioner of Public

Works, reciting the resolution above quoted, and prescribing the terms and conditions upon which the Municipal Gas Light Company might lay its gas mains and pipes in the streets, avenues and
288 public places in the City of New York. It was therein provided, among other things, as follows:

"Ninth. The permission given by said resolution of the common Council, unless sooner revoked as hereinafter provided, shall continue for the period of thirty years from the date of the signing of these conditions by the Mayor, Comptroller and Commissioner of Public Works: provided all the conditions herein prescribed shall be fully performed by the said Company. Neither said permission nor any right conferred on said Company by said resolution shall be assigned nor transferred without the previous consent of the Common Council.

"Tenth. The Common Council may repeal, annul and revoke the said resolution and the permission hereby given upon the failure of the said Company to perform any of the conditions herein contained, and thereupon all right of said Company under said resolution and these conditions shall cease, and said Company shall thereupon remove all its pipes and mains from the streets, avenues and public places."

The Knickerbocker Gas Light Company was incorporated in 1876, under the provisions of the Act of the Legislature passed February 16th, 1848, entitled, "An Act to authorize the Formation of Gas Light Companies," and the various acts amendatory and supplementary thereof. The certificate of incorporation, executed June 24th, 1876, provided that the term of existence of the Company should be fifty years. The Company claims to have become vested through mesne assignments with all the rights and privileges conferred by Chapter 944 of the Laws of 1871, passed June 12th, 1871, whereby there was granted to certain individuals therein named, and their assigns, authority to manufacture, make and sell gas to be used for the purpose of lighting all that portion of the City of
289 New York lying north of the center line of 79th Street, including all of the Central Park,

"and to lay pipes for the purpose of conducting the gas in any streets, avenues, lanes, alleys, squares and parks of the said City and of the said Central Park; and also the said persons and their assigns shall so conduct their manufacture or manufactures of gas as not to create a nuisance, and that in digging and laying pipes in any public street, avenue, lane, alley, square, park or highway the same shall be done in a proper and workmanlike manner, with as little delay and inconvenience to the public travel as practicable and without injury to the Croton pipes."

It was further provided that nothing therein contained should be construed to authorize the laying of gas pipes within the Central Park or any of the parks or other territory within the control of the Department of Public Parks without the consent of the said Department of Public Parks first had and obtained.

The Knickerbocker Gas Light Company also claims to have suc-

ceeded to the rights of the Anthracite Gas Lighting and Heating Company of New York, a corporation organized under the General Manufacturing Act of 1848. Its certificate of incorporation was filed on May 28th, 1863, and provided that the corporate existence should continue for the period of fifty years.

By resolution of the Boards of Councilmen and Aldermen, adopted respectively June 18th and 22nd, 1863, said corporation was granted the right to lay pipes and mains for conducting gas through the streets etc. in the City of New York for a period of fifty years.

It is apparent that the Complainant exists and exercises powers under three classes of franchises or grants:

(1) The franchises granted by the State to the constituent companies to be corporations. These in some instances also confer rights to the use and occupation of the streets;

290 (2) The franchises, rights or licenses granted by the Municipality to the constituent companies to use its streets, alleys and public places for the purpose of laying their mains therein; and

(3) The franchise granted to Complainant by the State (Chapter 367, Laws of 1884, under which the consolidation was effectuated), to be a corporation and to hold and exercise the franchises and rights theretofore granted to the constituent companies.

It is claimed by the Defendants:

(1) As regards the State Franchises, that there are fatal defects in the title of the Knickerbocker Gas Light Company to any rights claimed by it under Chapter 944 of the Laws of 1871; and that the existence of the Harlem Gas Light Company terminated by the limitations of its charter on February 1st, 1905.

(2) As to the Municipal Franchises, that those of the New York Gas Light Company and Manhattan Gas Light Company expired many years before the consolidation—the former in 1853 and the latter in 1868, while that of the Metropolitan Gas Light Company expired in 1888; that the grant to the Harlem Gas Light Company, although by its terms unlimited as to time, necessarily expired with the termination of the Company's corporate existence. Moreover that even if still existent, such franchise was not in terms assignable, and was at best a mere license, because of the City's reserved right of purchase. That the Municipal Gas Light Company franchise was void in its inception, as the Common Council could not delegate its powers to the Commission by which the grant was made, and, even if valid, it was by its express terms not assignable without the consent of the Common Council; and that the Knickerbocker Gas Light Company acquired no rights as successor of the Anthracite Gas Lighting and Heating Company, for the reason that the latter was not incorporated under the Gas Companies' Act of 1848, but under the General Manufacturing Act.

(3) As to the Franchise under Chapter 367 of the Laws of 1884, pursuant to which consolidation was effected, that the statute

291 in question did not apply to public service corporations, and Complainant could, therefore, not be created as a valid legal entity for the purpose of holding franchises of the various constituent companies.

and that the land thereupon reverted to the plaintiff. The contention of the defendant railroad company that it took a perpetual easement for railroad purposes was sustained, the Court saying:

"The land was to be taken for a permanent public use. It could not have been understood or expected that the railroad should be operated for the accommodation of the public for fifty years, and that then, after the necessity for it had greatly increased, it should disappear. While the life of the corporation was limited to fifty years, it could not have been expected that it should really cease to exist at the end of that period. While the legislature reserved the right to cut its life short, it also had the power to extend it. It is the experience of mankind that such *quasi* public corporations never come to an end by mere effluxion of time. A raiload corporation which had, during fifty years, rendered a public service and properly discharged its corporate functions would, with the passage of years, become more and more useful and more and more a necessity. Could it have been the legislative intention that at the end of fifty years the lands taken under the act, with the railroad embankment, ties, culverts, bridges, buildings and other structures, so far as they had become fixtures, should revert to the original owners or their successors in title?"

See also *Peo. v. O'Brien* 111 N. Y. 1, 55.

Although the grant to this Company did not run to its successors and assigns its assignability would not appear to be open to serious question, particularly in view of the Statute of 1884 under which Complainant was organized.

The reserved right of purchase was of doubtful validity, as it is conceded by counsel for the City that, until the year 1904, the City had no legal authority to make its own gas or other illumi-
295 nant. Even assuming that such a sale would be now practicable, there is no evidence in this case that it has been contemplated or attempted.

As to the Municipal Gas Light Company, the objection that the Commission, by which its franchise was granted had no power to act, is covered by provision of Chapter 530 of the Laws of 1885, as follows:

"Nothing in this sub-division shall apply to or shall affect or impair the right to lay such pipes or mains in the streets, avenues and public places of the said city, heretofore conferred *or intended to be conferred* upon any corporation by the mayor, the comptroller and the commissioner of public works, acting under and in conformity with the resolution of the common council, adopted and approved in the month of December, one thousand eight hundred and seventy-six; *and any and all grants made by such officers under and pursuant to said resolution, prior to April twenty-first, one thousand eight hundred and eighty-three, are hereby in all respects ratified and confirmed.*"

Although this Statute is claimed to be unconstitutional, its validity must be assumed for the purposes of the present proceeding.

The fact that the Company was prohibited from assigning the permission given to it to lay gas mains without the consent of the

Common Council, and that no evidence of such consent has been given, is of little force, in view of the clause which immediately follows the prohibition. That provides that upon the failure on the part of the Company to perform any of the conditions imposed upon it the Common Council may revoke the permission previously granted, and all rights of the Company shall thereupon cease, and it shall remove its pipes and mains from the streets. As already stated, there is no proof of any such act of revocation.

Summarizing the situation as to the municipal grants, it
296 will be noted that while those of the New York and Manhattan Companies expired in 1853 and 1868, respectively, that of the Metropolitan Company did not expire until 1888, four years subsequent to the consolidation. That of the Harlem Company is unlimited as to time, that of the Municipal Company did not expire until March, 1907, after the commencement of this action, and that of the Knickerbocker Company is unlimited as to time under the Act, Chapter 944, Laws of 1871, and will expire in 1913, under the grant to the Anthracite Gas Lighting and Heating Company.

The legislative grant to the Metropolitan Gas Light Company not only covers the entire Borough of Manhattan but is unlimited as to its terms. That to the Knickerbocker Company is broad, general and perpetual in its terms for all the territory above 79th street and for Central Park, granting authority to place pipes in the streets without consulting any municipal authority except so far as concerns the Park.

As bearing particularly upon the status of the older constituent companies the nature of the rights conferred respectively under the state and municipal franchises is to be considered. Concededly the power to grant to a corporation the right to manufacture and distribute gas is vested wholly in the Legislature. This power may be exercised either by special act of incorporation, as in the case of the New York, Manhattan and Metropolitan Companies, or by a general law, as was the case later with the Municipal, Knickerbocker and Harlem Companies. The municipality is vested with no power whatever to charter a corporation for such purposes or to confer on any such corporation the power to operate its plant and sell its gas.

On the other hand, it is quite within the power of the Legislature to authorize a gas company to open the streets without any reference to, or permit from, the municipal authorities, as was done in the case of the Knickerbocker Company (*Ghee vs. Northern Union Gas Company*, 158 N. Y., 510, 513). In the case just cited, the Court of Appeals recently considered at some length the nature of the rights
enjoyed by gas companies in the City of New York. The
297 Transportation Corporations Act, (Chapter 566 of the Laws of 1890), provides in substance that if a corporation be incorporated for the purpose of supplying gas for light in the city, town or village where it is located, it must first obtain the consent of the municipal authorities. The question presented to the Court arose under certain provisions of the Greater New York Charter (Chapter 378 of the Laws of 1897), whereby certain powers were granted to the Com-

missioners of Public Buildings, Lighting and Supplies and the Commissioner of Highways, and, as certified to the Court, it was as follows:

"Are the municipal authorities of the City of New York whose consent is required to lay conductors for conducting gas through the streets of such city, under the Transportation Law, the head of the Department of Public Buildings, Lighting and Supplies and the Head of the Department of Highways, under the powers conferred by the charter of the City of New York, or are the 'municipal authorities' referred to in the said Transportation Corporations Law the municipal assembly, or any other officer or body in the City of New York?"

It was held, reversing the lower court, that the power to confer a franchise rested solely in the Municipal Assembly as the successor of the Common Council, and that the functions of the other officers named were merely administrative. The distinction drawn by the Court is of great significance in determining the proper effect to be given to the municipal grants. It was pointed out that Section 61 of the Transportation Corporations Act, above quoted, was but a reenactment of Section 18 of the Gas Companies' Act of 1848 (Laws 1848, Chapter 37). As to the effect of the consent thus given, the Court said:

"It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the
298 land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise. The State might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances; but the tendency of later years, which is well grounded in reason, is for the State to confer upon the local municipal authorities the right to represent it in the matter of granting franchises to the extent that the final act necessary to the creation of franchises must be exercised by such authorities. The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest in the land. (*People ex rel. Woodhaven Gas Co. vs. Deehan,* 153 N. Y., 528). The court said at page 532: 'The consent of the town authorities conferred upon the relator a franchise to carry on its business in the town and to lay conductors in the streets and highways for the purpose of delivering gas. That such a franchise is property that cannot be destroyed or taken from it or rendered useless by the arbitrary act of the village authorities in refusing the permit to place the conductors under the streets.'"

As regards the power conferred upon the Commissioner of Public Buildings, Lighting and Supplies and the Commissioner of Highways, it was pointed out that such powers were administrative merely and were conferred in language similar to that used in earlier charters, beginning with Laws of 1862, Chapter 361, which contained a provision that

"The Croton Aqueduct Department of the City of New York shall have cognizance, control and general direction * * * in the laying down of gas and water pipes * * * and no removal of pavement for such purposes shall be made until a permit is first had of the said Croton Aqueduct Department."

299 The Court then stated its conclusion that,

"the consent that is necessary to confer a franchise upon a gas lighting corporation can be given only by the municipal assembly through appropriate ordinances, but that when the consent has been granted to a corporation duly created, by which a corporate franchise, which is property, has been acquired, the administrative officers must be applied to for a permit that will allow the corporation to exercise such rights in order that the public convenience may be subserved. The permission forms no part of the franchise and is not essential to its existence, and, if refused, the granting of it may be compelled by mandamus, as indeed, it has been in a number of cases, but the officers to whom application must be made may, within reasonable limits, fix the time when work on the streets may be begun, determine what portion of a street shall be first opened, how much of it may be left open at a a time, the depth of the trench and other details, the careful regulation of which is of first importance to a metropolitan city like New York. And the sole purpose of these sections, as we read them, was to vest completely this important administrative power in the commissioner of public buildings, lighting and supplies and the commissioner of highways, leaving to the legislative departments of the municipal government the power that has always belonged to it, of performing such act as the state has declared to be necessary in order to create a franchise."

Having in mind the distinction drawn in the foregoing decision between the consent necessary to confer a franchise and the mere administrative function of regulating the details of opening the streets, there would seem to be little question as to the validity of the rights now enjoyed by the older constituent companies. The consents to occupy the streets were given in the case of the New York and Manhattan Companies by the grants, and in the case of the Metropolitan Company by the resolution, of the Common Council, above recited. It is true that such consent was in each case for a limited period, but, in view of the acquiescence of the municipality in

300 the continued use and occupation of the streets for many years after the expiration of such periods, each company can now claim that it has, as the Court said, "a perpetual and indefeasible interest in the land constituting the streets" of the municipality. The only right that remains in the municipality is that of controlling, through its proper administrative officer, the details of opening such streets. In other words, the municipal authorities having, whether by formal consent or by acquiescence, assented to the "digging into" of the streets for the laying of the mains, have exhausted their power, excepting as to the matters of police regulation involved in the opening of street surfaces for repairs and the like. In view of the time that has elapsed since the expiration of the original grants—in the case of the New York Company over fifty years, dur-

ing which time the Company has continued to supply gas to the public in accordance with its charter,—it would seem that the Municipality is certainly estopped from asserting a position inconsistent with its own practical construction of the effect of the original grant. I have been referred to no authority precisely in point, but the trend of the decisions supports the views above expressed.

In *People ex rel. N. Y. & Richmond Gas Co. vs. Cromwell,* 89 App. Div., 291, the relator, which had been furnishing gas since 1856 in a territory which by operation of the Greater New York Charter of 1897 became a part of the City of New York, applied to the Commissioner of Gas & Electricity for a permit to open certain streets not previously occupied. That official denied the application on the ground "that no rights or franchises in the streets, lanes, avenues or highways have been shown to be in the applicant corporation." The relator alleged that consents to lay its pipes had been obtained directly after its organization from the town officials of each township in which it proposed to operate. The Court said:

"The action of the highway commissioners of these several towns in the year 1856, acquiesced in without objection for nearly
301 half a century, in the absence of a plain provision to the contrary, raises a presumption of the consent of all of the municipal authorities of the several towns, and particularly where the consents so granted were acted upon promptly, and the corporation entered upon the discharge of its obligation to the public in supplying gas in the various townships under the provisions of the law. In *Jennings v. Van Schaick* (108 N. Y. 530, 532) where the plaintiff was injured by falling into an opening in the sidewalk, the court said: 'It does not appear that the defendant, who owned the premises, had ever obtained from the municipal authorities any formal license or permission to construct the opening in the sidewalk, but such authority was a reasonable inference from an acquiescence of eighteen years without objection from the city.' So in the case now before us, if the highway commissioners were not the municipal officers of the towns who were charged with the responsibility of acting, if they did act, and no other municipal authorities questioned their right to do so, but stood by and saw the plant installed, they would, unless the statute specially provided the method in which their consent was to be evidenced, be deemed to have ratified the consent of the highway commissioners, and the presumption would arise that they had given their consent. (*Schubkegel v. Butler,* 76 App. Div. 10, 13; *Jorgensen v. Squires,* 144 N. Y. 280, 285; *Donnelly v. City of Rochester,* 166 *id.* 315, 318.) This result would, it seems to us, under the authorities cited, follow even were it not possible to show any formal action on the part of the highway commissioners, for it is not suggested that the corporation did not construct its plant and distribute its gas in these several towns nearly a half century ago, and it appears that several of the villages which have since been created have taken gas under contracts with the relator and its predecessor. To say at this late day that the respondents may deny to the relator his rights under its franchise, upon any technical question growing out of the manner of the consent

given so long ago, is to give precedence to unimportant forms above the substantial requirements of justice."

See also *Peo. ex rel. Woodhaven Gas Co. v. Deehan, ante.*

302 *Second. Complainant's Right to a Return.*

The conclusion being thus reached that, for the purposes of this case, the Complainant holds valid existing franchises, the next question is whether they constitute such property as is properly to be included among the assets upon the value of which the Complainant is entitled to a return.

In the briefs submitted on behalf of the Defendants, counsel have argued this question at considerable length, claiming that while such franchises may be regarded as of value for purposes of taxation, they are not to be capitalized against the consumer.

It is said that—

"a franchise of a public service corporation is, in effect, a contract between that corporation and the public, whereby the public permits the corporation to render a public service, and the corporation agrees to render that service, at a rate of charge which will enable it to earn a fair return upon the tangible property necessarily devoted to the particular use; it is not a contract whereby the corporation is permitted to supply the service at a rate which would enable it to earn a fair return upon the tangible property devoted to the public use plus a fair return upon the value of the contract itself, as a source of profit."

No authorities have been cited in support of this proposition and numerous decisions to which I have been referred indicate that it is not well founded. The question is not open for discussion, however, as it is fully disposed of for the purposes of this report by the expressions of the Court in deciding the motion for preliminary injunction in this cause. It was then said (*Consolidated Gas Company vs. Mayer,* 146 Federal Reporter, 150, 157):

"In estimating the value of the property of Complainant embarked in the business, the commission (the defendant, the Commissioner of Gas & Electricity) reached the conclusion that the
303 franchises under which it has laid mains and is delivering gas, and which are a part of its property, should be considered as of no value whatever, although the state, through the action of its taxing officers, had declared that they are worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. That proposition need not be considered, because it is not asserted that all of them have lapsed. The complainant has taken over the franchises of many different corporations, granted at different times. So long as a substantial part of these still remain, the argument is not affected, except as to details of result. The reason assigned by the commission for not including the value of the franchises is that 'they were granted by the people without compensation.' That is so. These franchises were granted very many years ago, at a time when there seems to have been no intelligent appreciation of the fact that they might become enormously valuable, when reckless improvidence was the rule, and

all sorts of franchises were given away, without any provision for securing to the state its fair share of unearned increment thereon. Nevertheless, when the state offers a franchise to whoever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously, and fully develop it by the expenditure of his own money, and such offer is accepted, and the terms of the agreement carried out by the taker, there results a contract which, with due consideration of all proper conditions and limitations inherent in the nature of the particular contract, is as much within the protection of the Constitution as are all other contracts. If the state 25 or 50 years thereafter should say to the taker: 'We were improvident in not providing that you should pay us something each year for this franchise; therefore, hereafter you shall pay us 8 per cent. annually on $10,000,000 or $20,000,000, or we will evict you from the franchise,' it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence. A franchise, whatever its value may be, which has not expired nor lapsed, nor been in some way forfeited, is property in the hands of its holder. There
304 is force in the argument that when the state says: 'We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an 8 per cent. return on your property,' it is seeking to accomplish by indirect methods what it might not be able to accomplish directly."

Third. Value of the Franchises.

It, therefore, remains only to determine the value to be ascribed to such franchises. The record contains but little direct evidence on the subject. There is no proof showing their original cost to the constituent companies. Their cost to Complainant at the time of the consolidation in 1884 does not clearly appear, for the reason that the item "franchises and rights," for which stock was issued to the amount of $7,781,000, embraced other items as well as the particular franchises now in question. Complainant's President testified in the Special Franchise Tax case, below referred to, as follows:

"The $7,781,000 was considered to represent at that time (1884) the franchise and business and contracts and patents and goodwill—everything in fact except the tangible property; the word 'franchise' was used (but not in the inventories) as a general word to cover the whole for which the $7,781,000 of new stock was issued and not as representing any particular franchise as that word is being used to-day * * * There was no appraisement of franchises. * * * The appraisement was made only of the tangible property."

Of the assets thus included, it is clear that the franchises and goodwill have increased enormously in value since 1884 from the growth of the City with the attendant increase in population and development of business. Their value is further enhanced by the fact that under the present law (Consolidation Act, Secs. 73 and 74)
305 such franchises may now only be granted for the period of 25 years, and onerous conditions are imposed for their procurement.

The only direct evidence as to their present valuation is based on the action of the State Board of Tax Commissioners, under the so-called Special Franchise Tax Law (Chapter 712 of the Laws of 1899), which was referred to by this Court in its opinion above quoted. This statute amended the Tax Law as previously existing by including, among other things, in its definition of real estate:

"The value of all franchises, rights, authority or permission to construct, maintain or operate in, under, above, upon or through any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil or other substance or electricity, for telegraphic, telephonic or other purposes."

The act further provides that:

"A franchise, right, authority or permission specified in this subdivision shall for the purposes of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation, situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise."

The State Board of Tax Commissioners fixed the assessment of the Complainant for the year 1899 at $15,828,600 which included the value of its tangible property in the street. After receipt of written complaint this was reduced to $13,950,000. Complainant and a number of other corporations affected procured writs of certiorari to review their respective assessments, and the proceedings were sent to a referee for hearing. In his report the referee sustained the validity of the statute, but found that the as-
306 sessment of Complainant's special franchises should be reduced to $9,346,500, to make it conform to the assessed valuation, for purposes of taxation, of other real estate in the City of New York. The judgment of the Special Term confirming the referee's report was upheld by the Court of Appeals (*People ex rel. Consolidated Gas Company vs. State Board of Tax Commissioners*, 174 N. Y., 417), and the constitutionality of the Act was sustained by the Supreme Court of the United States. (199 U. S., 1.)

The main objection to the statute urged by the relators was that it violated the Home Rule clause of the Constitution, in that the assessment of real estate was taken out of the hands of the local assessors and delegated to State Officials not elected by the electors of the City or appointed by any City authority. In discussing this question, the Court of Appeals took the position that it had been found by the Legislature, "that the valuation of this new kind of property,—intangible, invisible and elusive, but of great value,—would be attended with peculiar difficulties which would require a degree of knowledge and skill not possessed by local assessors but belonging only to experts, who had long and carefully studied the subject of taxation in all its varied aspects," and that accordingly, for the purpose of meeting this situation, the Legislature had "assigned the duty of making the valuation to the State Board of Tax Commissioners, composed of tax experts already in office, whose sole duty re-

lated to the subject of taxation in all its phases throughout the entire State."

The assessments of Complainant for special franchises in subsequent years were as follows:

1900	$13,950,000.	
1901	13,990,000.	
1902	16,275,000.	
1903	17,985,000.	
1904	21,900,000.	
1905	27,300,000.	(reduced from $30,500,000.)
1906	31,900,000.	

307 The Complainant called as a witness the Chairman of the State Board of Tax Commissioners, who stated that he had taken part in the valuation of the special franchises for the year 1905, and believed the $31,900,000. fixed by his Board to be a fair valuation thereof. As such valuation includes the mains of the Company and any portion of their services which are in the public streets, it was necessary, in order to determine the value ascribed to the franchises now under consideration, to deduct from the above figures the value of such mains and services as fixed by the Board. For this purpose the witness was asked to state the amount at which the mains and services were valued, and testified that, according to his recollection, the Commission had allowed about 50 per cent. more than the valuations given for such property in the report of the Complainant, submitted to the Board. The mains and services aggregated on the basis of cost of reproduction, according to that report, approximately $5,800,000. Adding 50 per cent. to this, the total valuation ascribed by the commission for the tangible property would be about $8,700,000, or, as Complainant's counsel urges, excluding portions of services outside of street lines, would amount to more than $7,900,000. Deducting this from the total assessment, would leave a valuation for the franchises proper of, say, $24,000,000.

On the part of the Defendants the only direct evidence bearing on the value of the franchises consisted of various tax reports submitted by Complainant to the State Officials.

It was shown that Complainant's Secretary, in verifying the complaint against the 1905 assessment, had stated that,

"the value of Complainant's special franchises in the City of New York does not exceed the sum of $4,261,156. The extent of said over-valuation (in the assessment for 1905) is, therefore, $26,238,844. * * *

"There is no method or evidence by which the value of the intangible right to lay and maintain mains and pipes in the
308 streets can be determined. There exists no market or demand for such rights, permissions and franchises. The price at which complainant's franchises or rights would sell, under ordinary circumstances is merely nominal. The municipal authorities of the

City of New York have never fixed any amount as the consideration for granting such a franchise, and the right to lay mains and pipes in the streets has always been procurable from said municipal authorities without the payment of any monetary consideration therefor. The number of such franchises which may exist at any one time has never been limited by said municipal authorities. The value of the said right to occupy the streets does not exceed the cost of procuring such a right from the City, and that cost is nominal."

In the complaint against the 1906 assessment, verified by the same officer, it was stated that the assessment of $31,900,000. was excessive and that

"the true value of complainant's special franchises in the City of New York and the amount for which the same would sell, under ordinary circumstances, does not exceed the sum of $14,000,000."

These valuations were explained in the testimony by the statement that, in view of the contention of the Complainant that the Special Franchise tax was unconstitutional, the counsel had advised the insertion in its petitions for revisions and for *certoirari* of simply the value of the tangible property in the streets. This was arrived at by a computation of the cost of laying pipes in soft earth with no obstructions. The figure stated in the petition of 1905, $4,261,156, was accordingly given, being the aggregate of two items, $3,666,-531.38 for mains and $594,625.01 for services, appearing in the tax report of Complainant for the year 1904. After the affirm-
309 ance by the United States Supreme Court, in May, 1905, of the constitutionality of the Statute, the Company acting again under advice of counsel and in conformity with the assessment for 1899 of $13,950,000, fixed the valuation of the special franchise at $14,000,000.

It is obvious that the foregoing evidence is of but slight assistance in arriving at a satisfactory conclusion regarding the value of the franchises. While it is urged on Complainant's behalf that the special qualifications of the State Board of Tax Commissioners, as pointed out by the Court of Appeals, entitle their conclusions to peculiar weight, the fact remains that it is contesting the assessment as excessive. I am not, on the other hand, irrespective of the explanations made by Complainant's officers, disposed to attach particular importance to statements of the character appearing in the complaints above quoted. As hereafter pointed out, they do not, under the authorities, constitute an estoppel, although sometimes valuable as evidence.

There is nothing to show the basis on which the State Board arrived at its appraisement of the intangible element of the special franchise. It may fairly be assumed, however, that it had in mind chiefly the earning capacity of the property. A suggestion to this effect appears in the opinion of the Court of Appeals (p. 439):

"On the other hand, the valuation of special franchises had never been attempted before, but presented a new field of action and called for the exercise of new and different functions. They could not be seen, handled, measured, weighed or counted. They were specialties, and had no market value. There were no sales to guide and no

experience from ownership, rental or use to rely upon. The new property is real estate in name, but not in reality, for it is a mere privilege to do something in public streets and places not permitted to citizens generally. While local in a narrow sense, it is unconfined in its real nature, for it depends largely on the *earning capacity* of a going concern, frequently, with several special franchises, but with *no means of determining the amount earned by each.*"

310 This method was followed in the recent case of *People ex rel. Brooklyn, Queens Co. & Suburban R. R. Co. vs. The State Board of Tax Commissioners* (New York Law Journal, March 5, 1907), in which Mr. Martin Saxe, the referee appointed in *certiorari* proceedings to review the special franchise assessment of the relator, held as follows:

"Now we are called upon to consider the two elements composing a special franchise under the tax law of this State, and they are, first, the tangible property in connection with the operation of the franchise, and secondly, the intangible property, that is the right to operate conferred by the franchise grant. The total value of these two elements makes up the value of the special franchise.

"According to the foregoing method for estimating the value of a franchise we must first find the gross earnings from operation and deduct from that item the cost of operation, thus reaching the net earnings; and from the net earnings there should be deducted an allowance for a fair return upon the value of the tangible property, and this final sum is then capitalized at an arbitrary rate per cent. to ascertain the value of the intangible right under the franchise grant."

As authority for this procedure he cites Mr. Henry C. Adams, Professor of Political Science in the University of Michigan, a special expert on franchise valuations for the Michigan Tax Commission, as reported in the proceedings of the National Conference on Taxation, held in Buffalo, May, 1901.

Adopting this method in the present case, and taking the value of the tangible assets at $63,357,000, being the sum of the various items hereinbefore allowed, and allowing 5 per cent. upon the value thereof as a fair return, the amount representing the earning capacity of the tangible assets alone would be $3,167,850. Complainant's net earnings for the year 1905 were, in round figures $4,588,000. Deducting from this the $3,167,850, there remains the sum of $1,420,150 as representing that part of the net income attrib-

311 utable to the intangible assets. This sum capitalized at 7 per cent. would give a little more than $20,000,000 as the value of the intangible assets. The percentage rates of return on tangible assets and for capitalization are those adopted by the referee in the case in question.

This method of arriving at the value of a special franchise, though perhaps the best one available, is hardly accurate, for it results in ascribing to the special franchise alone a value which is in fact composed of a number of other elements. Not only is a public service corporation thus assessed on the value of its franchise to occupy the streets but also on all other intangible rights of every description,

including its franchise to be a corporation and its good-will as a going concern. Such assets as these they have in common with all other corporations whether or not engaged in the public service, although it was evidently not within the purview of the Statute to reach anything except the value of the franchise derived from the public. That there is a wide distinction between the two is apparent. The right of a public corporation to occupy the street has a substantial value, whether for purpoess of sale, condemnation or taxation, upon the very organization of the company, and it is a matter of common knowledge that special franchises of this sort are often hawked about among capitalists and disposed of for substantial sums before any business whatever is transacted under them. But the intangible asset known as good-will is a matter of growth and necessarily involves the contined development of the company and the perfecting of its organization.

X.

Good Will.

In the present case, the Complainant claims that there should be included among its assets not only its franchises but also its
312 good-will. It is alleged in the bill that,

"In addition to its said franchise rights, your orator is possessed of a large amount of intangible property, which constitutes an integral and important part of said business. Such property consists of the value of the connections between the pipes and mains of your orator and the various buildings throughout the City of New York, the value of various contracts owned by your orator in connection with its business, the value of the organization of your orator's business and good-will, and various other elements of value which have been created and developed by your orator and its predecessors through intelligent and efficient business management during the past three-quarters of a century and fidelity to their engagements, all of which possess the full attributes of property and materially add to the gross earnings of your orator, upon which it pays an annual tax of one per cent. to the State of New York. By reason of such good-will it would be difficult, if not impossible, for any company in the City of New York, even if vested with similar franchises to those possessed by your orator, to compete in selling gas to consumers in the said city; and if your orator elected to sell its tangible property and franchises, it could, apart from these, obtain a large sum for the said good-will. And your orator avers that upon this good-will, as an element of substantial value, it is entitled to a reasonable return, and that, in fixing the price, at which your orator should sell its gas, as hereinbefore stated, the said Commission of Gas and Electricity allowed no return whatever upon the value of the said good-will but wholly eliminated it as an item of substantial value."

These allegations are denied by the defendants, and the answer of the State officials alleges as follows:

"These defendants further allege the fact to be that the conduct

by the complainant of its business and manipulations of its stock issues and its successful endeavor to monopolize the lighting industry in the County of New York have been viewed with disfavor by the public and that the complainant has no good-will of
313 value but that, on the contrary, it owes its custom not to the manner in which it has conducted its business but to the absence of competition."

Outside of proof that Complainant had secured control of a majority of the stock of each of the other existing lighting companies, no evidence was offered in support of the above allegations, but, assuming them to be well founded, it seems to me that they are predicated upon an erroneous view of the meaning of the term "good-will" as involved in Complainant's claim. It is not necessarily the ordinary commercial good-will, such as attaches to an old firm name or place of business and is based in large degree upon the personal standing of the founder of the house. The modern decisions have recognized its proper scope as including that species of intangible value which comes from the gradual building up of a complete organization in the successful operation of a going concern. Such value can exist in the case of large corporations, notwithstanding public disfavor, unless this disfavor reaches such a point as to result in the absolute destruction of the business. An instance where good-will of this description was considered by the Court was in *National Water Works Company vs. Kansas City*, 62 Fed. Rep., 853, which was a condemnation proceeding. The Court in its opinion, per Brewer, J., said:

"Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water-works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that
314 system connected, as it is, with so many buildings and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent? Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with

actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The City, by this purchase, steps into possession of a water-works plant—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn."

See also, *Spring Valley Water Works vs. City and County of San Francisco,* 124 Fed. Rep., 574.

The nature of this intangible asset was well described in the report of Mr. Talfourd P. Linn, Special Master, filed June 8th, 1906, in the case of the *Columbus Railway & Light Co. vs. The City*
315 *of Columbus,** in the Circuit Court of the United States, Southern District of Ohio: That action was similar in its general scope to the present. It was said:

"Complainant is also entitled to a fair valuation of what may be called its going business, or its good-will; that intangible addition to the assets of every corporation which arises out of its management and is a gradual growth from its organization, consisting in this case of a knowledge of the buisness, a knowledge of the wants and demands of its customers, a knowledge of the growth of the city, and the tendencies of that growth as it has been observed through a period of years; the organization of its office and operating department, and in general, all the experience which belongs to and is the property of every going concern, and which is acquired through a period of years of active operation. In one sense of the word, the operating organization of a going concern, whether it be a common carrier, a gas company, or water company, a light company, or a private manufacturing company, may be said to be of even more value than its physical assets, its brick and mortar. The physical property is practically worthless without the management or organization; the management or organization is powerless without the physical property, and an electric plant for the purpose of furnishing light and power to the city of Columbus, standard built and equipped of the most modern type, with its lines extended and connected, its lamps installed in houses and business places, its wires connected up to furnish power for the machines, without an efficient organization and management would fail utterly to fulfill the purpose for which it was constructed, until that organization and management could be assembled, and acquire a knowledge of the city, the wants of its people, and the demands of the business.

* Unreported. Confirmed without opinion, August, 1906, by Thompson, J.

Granted that with a plant so established, there could instantly be found skilled, capable and efficient employees to occupy every position necessary to operate its business, and to deliver its
316 product or service, still this want of knowledge on the part of those employees and officials would necessarily hinder and delay the delivery of light and power, cripple the conduct of the business, and cause great loss until that knowledge had been acquired by the only teachers possible—time and experience.

This knowledge possessed by the Complainant derived by it from its own experience, and by acquisition and purchase from its predecessors, has an indeterminate, but necessarily a value, in ascertaining what is the true value of complainant's property devoted to the public use in any controversy as to compensation based upon that value."

In the above case the Special Master, while stating that he took the intangible assets into consideration, did not undertake to fix any definite value for the good-will described by him, and it is obviously very difficult, if not impracticable, to do so. As indicated in the remarks above quoted, it may very well be that, in some cases, the operating organization of a going concern is worth more than its physical assets, and this is especially true when the concern in question owns in combination therewith the additional intangible asset of a public franchise or of good-will in the ordinary commercial sense. For example, in *People ex rel. Cornell Steamship Co. vs. Dederick*, 161 N. Y., 195, which was a tax case, it appeared that the bonded indebtedness of the Company had been increased from $400,000. to $700,000 for the purpose of purchasing the boats and good-will of the business of another steamship company. The Court said (p. 210):

"The evidence fails to show the precise amount that was paid for the boats of the company, or how much was paid for the good will of the business. The parties to the transaction, doubtless, did not know themselves; for, as we understand, the purchase was for a lump sum of $300,000, and that included the good will of the business with the tangible property. The president of the relator, however, in his testimony, after fixing the value of the boats
317 owned by the company at $550,000., which included the boats purchased in 1893, stated that *in making that purchase he regarded the good will of the business as worth more than the boats.* This testimony, we think, permits us to properly treat as a fact in the case that at least one-half of the increased bonded indebtedness created in 1893, to wit, $150,000., was contracted for the good will of the business of the company then purchased by the relator."

In *Washburn vs. National Wall Paper Company*, 81 Fed. Rep., 17, which was an action to restrain the payment of interest upon certain obligations of the company on the ground that it would impair its capital, one of the questions discussed was whether stock is issued for "property actually received" within the meaning of the New York Statute when it is issued for good will only, and whether, in that particular case, assuming that it could be so issued, the good will was taken at its actual value. It appeared that common stock to the amount of $2,100,000. had been issued for the good will of a

business purchased by the defendant corporation. The Court held that the evidence did not justify a finding that it was not worth this amount, especially in view of the fact that it appeared that a net profit of over $110,000. had been made in eleven months out of a plant worth considerably less than $320,000.

In the present case Complainant claims as the value of its good-will the sum of $7,500,000., and in support thereof relies on the opinions of two witnesses, Dr. Humphreys and Mr. Addicks. The Defendants offered no evidence on the subject.

Dr. Humphreys' testimony is as follows:

"Q. Assuming, Doctor, that in 1884, six gas light corporations operating in the City of New York were consolidated, forming the complainant company, the Consolidated Gas Company; that one of the constituent companies was incorporated in 1823 and was in operation from 1825 to 1884; and that the other five were
318 incorporated at intervals prior to the consolidation in 1884; that the output of the six companies in gas in 1885 was about 3,942,000,000 feet, and that the output has increased until in 1905 it was 13,283,000,000 feet or thereabouts; that the population of Manhattan Island, on which the Consolidated Gas Company is operating, is over 2,100,000 people; that it shows an increase of something like 50% in population in the last thirty years or so; that the Consolidated Gas Company has about 390,000 consumers, and is in active operation to-day, what would you consider to be the value of the good-will of that business, including the value of the established business, and its connections with consumers, and other elements which go to make up good-will as distinguished from its tangible plant?

A. I should estimate it at not less than $7,500,000."

This testimony is of little assistance for it does not clearly appear that the witness excluded, in fixing his valuation, all consideration of the value of Complainant's public franchises. Furthermore, it appeared later that his estimate was based upon a fixed scale of earnings. He assumed that the Company would be

"entitled to sell gas at one dollar; that it would be protected in its rights by the Courts to sell gas at a dollar and to make a return of 30 cents a thousand to cover profit and the burden of capital generally."

The basis of Mr. Addicks' testimony appears more clearly. He said that in his experience where consumers have connections and established relations with a gas company, it requires some special incentive to compel them to change. Such incentive, he said, would be a reduction in rate by a competing company to the minimum extent of 10 per cent. of the selling price of gas. Taking the Complainant's sales for 1905, 13,283,000,000 feet, such percent-
319 age would aggregate $1,328,300. This capitalized at, say 7 per cent. would amount to $18,975,000., or at 8 per cent., to $16,603,750., as the value of the good-will.

In the recent English work (*The Depreciation of Factories*, by Ewing Matheson, London and New York, 1903) the writer states his conclusion that "Where good will is separately valued it seldom

exceeds from one to three years' purchase of the net profits after deducting 5 per cent. interest on the capital employed in the business." On this basis, complainant's good will, assuming three years' net profits and capital invested of about $64,000,000, would have a present value of upwards of $5,000,000.

Neither of the methods above suggested affords a satisfactory basis for any specific finding as to the value of the good-will, considered apart from the question of franchises. It is clear that a new company, in addition to a substantial outlay for its franchises under existing laws (Greater New York Charter of 1897, as amended by Laws of 1901, Chap. 466, and Laws of 1905, Chap. 629, Sections 73-74), would be subjected to enormous expense before it could so perfect its organization as to supplant a powerful competitor already in the field. The relative cost of its franchises and good will might in such a case be to some extent apportioned. But in the present instance, their reproductive value is wholly in the realm of conjecure, and the two elements are so interwoven that there is no apparent basis for their separate appraisement. It is clear, however, that each is of substantial value and contributes very materially to complainant's earning capacity.

As I do not find it practicable to differentiate in figures the value of Complainant's franchises and good-will, I have concluded to consider all of the intangible assets together as a single item, the reasonable value of which I think may be fairly fixed at the sum of $20,000,000, or substantially the amount that would be reached by following the method adopted by the referee in the Queens County and Suburban Railroad case, before referred to. This ap-
320 pears to be a conservative estimate when tested by any available standard of comparison. The State Board of Tax Commissioners, as above pointed out, have assessed Complainant's special franchises on the basis of $24,000,000, exclusive of about $7,900,000, deemed to be the value of its mains and services in the streets. If from the total special franchise assessment of $31,900,000 were deducted the entire original cost of such mains and services, as carried on the books of the Company, it would leave a balance of nearly $23,000,000 for the intangible franchise rights alone: and again, if there were deducted from the $31,900,000, the cost of reproduction of the mains and services to-day, as claimed by Complainant, it would leave a valuation for the intangible rights alone of over $17,000,000. It is not possible to satisfactorily test the valuation of $20,000,000. by comparison with the valuation of $7,781,000. in 1884, for the reason, among others, that I do not find in the record any evidence showing the net earnings of the constituent companies immediately prior to consolidation, or of the Consolidated Company for some years thereafter. It is to be noticed, however, that a valuation of the intangible assets at approximately three times the value ascribed to them in 1884 is in general proportion with the increase of sales of gas, which were about 4,000,000,000 cubic feet in that year as against approximately 13,000,000,000 cubic feet in 1905. It is true that included in these sales was a considerable amount of gas manufactured by other companies. On the other hand, it is

to be remembered that, according to well recognized rules, the concentration of business of the constituent companies under a single management, had advantages that tended to increase their earning capacity to a marked degree and enhanced the value of their tangible assets. *Cleveland &c. Ry. Co. vs. Backus,* 154 U. S. 439, 444.

Capitalization and Value of Securities.

The amount and value of complainant's outstanding stocks and bonds which, under the rule in *Smyth vs. Ames,* are proper
321 factors to be considered in arriving at the fair value of its property, are of little service for that purpose in this case. The manner in which its capital has been employed in purchasing the securities of other gas companies and of electric light companies, and in financing the construction of its Astoria plant, makes it impossible to determine with any degree of accuracy what proportion of its outstanding capitalization represents its assets invested in the gas business on which it is entitled to a return. It now holds securities of other gas and electric lighting companies to the value, as shown on its books, of $53,000,000, representing their cost to the Company in cash or in its stock at par. Its holdings of securities of the Astoria Company aggregated, as of June 30th, 1906, $7,010,000, which is considerably less than its actual cash investment in that enterprise. Nor can the market value of the stock be properly considered in arriving at the present value of the complainant's property, for the reason that there is nothing in the proof to indicate how far such value has been affected by plaintiff's control of other lighting companies. There are, however, available the market quotations of the stock for the period between 1885 (the year after the consolidation) and 1900, when complainant's stock was first increased. During that time its capitalization stood at the sum of $39,078,000, and its outstanding bonded indebtedness did not exceed $1,836,507.53, all of which may be fairly regarded as having been invested in the gas business. The stock ranged in the year 1899 between 163 and 223¼, or an average of 193. At this price Complainant's share capital of $39,078,000 would represent a valuation of $75,420,540. Taking, in like manner, the average between the lowest and highest price of each year between 1885 and 1899, and then averaging the price for the entire period, the result is shown of an average of 1.558, which for the entire share capital would amount to $60,883,0[illegible] Tested, therefore, by this standard, the present valuation of $[illegible]57,000 for Complainant's assets, exclusive of franchises and good-will, would appear to be con-
322 servative, especially in view of the substantial increase in the business of the Company since 1900.

Complainant's Assets Compared with Those in Other Cities.

Considerable stress was laid by some of the witnesses upon the gas statistics of other cities. Such evidence cannot be regarded in general as of value because the variance in local conditions is so great as to make accurate comparisons impossible. A consideration of the statistics of any other city, therefore, is of doubtful utility without a

careful investigation of all the conditions existing in the particular place in question. The cost of plant, material, labor and supplies varies greatly in different parts of the country and so does the expense of distribution. There is no city, not even Chicago or Boston, where land is so expensive as in New York nor, as it would appear, is the cost of construction elsewhere so high. Speaking generally, it would appear from the statistics of other cities to which my attention was called that the assets of Complainant represented a lower structural value per thousand feet of gas sold than most of the others.

Boston:

The City of Boston, from its location on the seaboard, the physical characteristics of its soil, and the manner in which its streets are laid out and occupied, seems most to resemble New York City in the general conditions affecting cost of plant.

The Consolidated Gas Company of Boston was capitalized about a year ago, by Act of the Massachusetts Legislature, at $15,124,600, with a proviso in Section 3 of the Act that the Company "shall not " by the acceptance of the capitalization herein authorized be deemed " to have admitted *for any purpose* that the par value of such capital- " ization is equal to the value of its property or to the value of the " property *necessary for the conduct of its business.*"

323 The output of the Boston Company, at the time it was so capitalized, was about 3,000,000,000 feet annually, representing a capitalization of a little over $5.00 per thousand feet. Such capitalization, applied to the sales of the Complainant, would sustain a "capital" (not assets), of $66,415,000.

Professor Bemis, a statistician called by the city states, that, on the present volume of sales of the Boston Company, its capital amounts to $4.26 per thousand feet, which would be equivalent to a "capital" (not assets) of $56,585,000, for the Complainant on the same basis.

But, as suggested by the terms of the Act of the Massachusetts Legislature, the "capital" was not necessarily equal to the assets. The present value of such assets was appraised at the time of consolidation, and is set forth in the published report of the Massachusetts Gas Commission, produced by one of Defendant's witnesses. It approximates $23,000,000, or nearly $8.00 per thousand feet; and if this unit be applied to the sales of the Complainant, it would indicate a present value of Complainant's property (exclusive of franchises and good will) of $106,000,000.

Philadelphia:

The Philadelphia plant is being operated by the United Gas Improvement Company under lease; and Mr. Marks showed that the Company has *added* to plant as turned over by the City, $16,018,-192.22, or 2.15 cents per thousand of sales. It was suggested in the record (although no proof to that effect was offered) that the value of the plant so turned over to and used by the Company is about $30,000,000. Assuming this to be the fact there would be a total plant value of $46,000,000, or about $6.00 per thousand feet of output.

At this rate, Complainant's tangible property only, would be valued at about $80,000,000 on its sales of 13,283,000,000 feet.

Chicago:

The capital of the Chicago Companies is over $6 per thousand feet, as Professor Bemis testifies; at which rate the capital of the New York Company would be about $80,000,000.

324 Professor Bemis testified in Chicago, that he thought the property of that Company could be duplicated at $3.20 per thousand feet or about $35,000,000 in total, at which rate the property of the Complainant (exclusive of franchises and good will) would be worth over $42,000,000; but Mr. E. G. Cowdrey, of St. Louis, a gas engineer of wide experience, who testified in the same proceeding, said, referring to Professor Bemis's estimate:

"I will say that I have taken a company and replaced it abso-
"lutely from beginning to end, and I know positively that it would
"not be possible to replace the company here in Chicago with its
"first-class property and its business for less than $5 per thousand
"feet of annual output. I would consider it a *physical impossibility*
"to replace the plant and business of the People's Company for
"$35,000,000."

As a result of its investigations the Committee in Chicago found $5 per M. of sales, to be a fair valuation for "structural value and working capital" only; upon which basis Complainant's assets, exclusive of franchises and good-will, should be worth $66,425,000.

Baltimore:

In Baltimore, where the price of gas is also one dollar, Mr. Bemis testified that the value of that Company's entire property (including, it may be assumed, franchises and good will) should be computed at twenty times the net profits of the Company from its gas business; and that this was a conservative method of computing the value of gas properties.

It appears that the net earnings of the Complainant, from its gas sales only, for the year 1905 are $4,587,995.99 (Complainants' Ex., 96); and, if this be multiplied by twenty, it would produce a valuation for the Complainant of $91,759,919.80.

Montreal:

In a recent estimate for the City of Montreal Professor Bemis fixed for the construction of a plant $4.30 per thousand feet
325 of capacity, although there labor is lower, land less expensive, there is practically no rock, the City has only thirty-three miles of permanently paved streets to 160 miles of macadam, and has wooden sidewalks in 240 miles of streets out of a total of 340 miles.

Even if this unit, wholly inadequate and inapplicable to New York conditions, were applied, it would produce assets of $57,000,000 in New York, exclusive of franchises, good will and working capital, which were not included in the Montreal estimate at all.

As elsewhere shown a gas company cannot run at its full capacity and should have a reserve of at least twenty per cent. beyond its sales. No allowance appears to have been made for this in the Montreal estimate of $4.30; and if such reserve had been provided, the total cost of plant would have been $5.16 per thousand feet of sales, or equal to $66,425,000.

Average Throughout United States:

An examination of the statistics of the United States Census of 1900 respecting the gas industry in this country gives the following result:

Average capital per thousand feet sold..... $8.47
Average structural value per thousand feet sold..... 7.23

The cost as claimed by Complainant of its permanent plant and property (excluding franchises, good will and working capital) represents only $4.18 per thousand feet of sales or less than the capitalization per thousand feet, shown by the Boston Company under express authority of the Legislature; while the present value of the corresponding property of Complainant, as claimed amounts to only $5.06 per thousand feet of sales or substantially less than the present value of the assets of the Boston Consolidated Company.

Complainant's Tax Reports.

It is urged by Defendants, with regard generally to the assets on which Complainant seeks to be allowed a return, that its
326 valuations, as given to the tax offic*lais*, are far below those which it now claims. Reference has already been made to Complainant's valuation of franchises in its reports to the State Board of Tax Commissioners. The criticisms of Complainant's statements as to the other assets may be best illustrated by an analysis of the report to that Board for the year 1904, as compared with the book valuations of the different items:

	Investment as shown by ledger.	Value stated in tax report.	Difference.
Real Estate	$11,216,479.71	$11,216,479.71	
Plant	15,755,462.88	8,456,595.71	$7,298,867.17
Mains	7,571,808.83	*3,666,531.38	3,905,277.45
Services	1,227,931.86	*594,625.01	633,306.85
Franchise and Rights	7,781,000.00	7,781,000.00	
Stocks of other Companies	46,674,034.27	46,674,034.27	
Bonds and obligations of other Companies	8,686,744.70	8,686,744.70	
Material and Supplies	697,014.92	697,014.92	
Accounts and Bills Receivable	1,944,968.00	1,944,968.00	
Cash on hand	1,146,866.87	1,146,866.87	
Unclaimed dividends	39,052.50	39,052.50	
Metropolitan Fund	500.00	500.00	
Meters, Stoves and other personal property	3,630,772.12	2,667,329.77	963,442.35
Totals	$106,372,636.75	$93,571,742.93	$12,800,893.82

*Stated in the Tax Report under the heading "Present Value allowing for depreciation." "Reproduction" value stated as $5,613,221.12 for Mains and Services, detail of which (not asked for and not given in Tax Report to State Board) is as follows:

For Mains	$4,829,925.82
" Services	783,295.30
Total	$5,613,221.12

The first two items under the second column, $11,216,479.71 and $8,456,597.71, appear in said tax report at one point or another as a single item, $19,673,075.42, "Real Estate and Plant."

327 With regard to the four items in which the book values differ from those in the tax report, Complainant's explanation is as follows:

(*A*) *Plant.*—The Charter of the City of New York (Chapter 466, Laws of 1901, Sec. 889) provides, in relation to assessments, that the Deputy Tax Commissioner shall furnish to the Board of Taxes and Assessments, detailed descriptions of real estate "and also, in their judgment, the sum for which said property, under ordinary circumstances, would sell."

Having in mind this statute and the fact that a gas plant is not susceptible of alteration for other purposes, Complainant's officers took the position that if a plot of land on which a gas plant was located was sold, it will bring merely the value of the land, with little or nothing additional for the plant, excepting the value of such machinery as could be transported. Accordingly, under advice of counsel, and assuming that sooner or later one-half of the real estate might be sold, in consequence of the removal to Astoria then contemplated, they made up the tax report on the basis of the full book value of the land, plus the book value of one half the plant, plus a few hundred thousand dollars to represent the possible scrap value of the other half of the plant, in the event of sale. This resulted as follows:

One-half of plant ($15,755,462.88) to be retained indefinitely in New York, consisting of holders, &c., full book value.....	$7,877,731.44
Add for value of the other half of plant, consisting of manufacturing plant, considered as scrap on removal	578,864.27
	$8,456,595.71
Land as per books.....	11,216,479.71
Total as stated in report of June 30, 1904..	$19,673,075.42

328 (*B*) *Mains.*—The reproduction figure of $4,829,925.82 was reached on the theory that, for purposes of taxation, the lowest and most favorable basis to the company should be assumed. Accordingly a computation was made by the Superintendent of Mains representing the bare cost of material and labor in laying the mains in soft earth, excluding all allowance for rock excavation, sub-surface obstructions, replacing expensive pavement, and other items going to make up the total cost of mains as now laid in the City of New York. From this there was deducted 25 per cent., not because of any physical deterioration of the property, but on the theory that the smaller sizes of mains would from time to time be replaced at a loss to the Company.

(*C*) *Services.*—The cost of reproduction was fixed at $783,295.30, with 25 per cent. off for depreciation, leaving a net of $594,625.01. The evidence does not show in what manner the valuation of services

was reached, but it is conceded that it was incorrect from any standpoint.

(*D*) *Meters, etc.*—In this case to reach the figure $2,667,329.77, as stated in the tax repot, there was taken off 25 per cent. as an estimate on the loss which might be expected should the property be sold at forced sale and irrespective of its value to the Company as a going concern.

While the foregoing explanations are not altogether satisfactory, my judgment as to the value of the property in question is not affected by the fact that the figures given to the tax officials are different from those now claimed on behalf of the Company.

It is a matter of common knowledge that reports, petitions and similar papers required in connection with matters of taxation are, in the case of large corporations, ordinarily prepared by counsel. To some extent they are in the nature of pleadings, and are so drawn as to support the theory on which it is hoped to secure the most favorable results, either before the tax officials or the courts. Under these circumstances, when, as in the present case, it appears that taxes are being constantly contested, it must very com-
329 monly occur that views are expressed on behalf of the corporation more or less inconsistent with the valuations it would put upon its property for purposes of sale, condemnation or such an action as the present. This has been recognized to a certain extent by the courts, and it has been held that, for example, admissions in tax reports, although valuable as evidence, constitute no estoppel when the question in controversy is actual value or cost of reproduction. (*Louisville R. R. Co. vs. Brown*, 946, 949; *Southern Pacific R. R. Co. vs. Board of R. R. Commissioners*, 87 Fed. Rep., 22.)

Here such admissions are of no particular value as evidence, because they are wholly at variance with the other facts clearly established in the case. As regards the plant, for example, the figures given in the tax report are of no significance when compared with the fact that its structural value at the time of the consolidation in 1884 was about $4,000,000 greater. Since that time there have been spent upwards of $11,000,000 in renewals, repairs and additional construction. The same is true as regards mains and services, beside which it is to be noticed that Complainant's valuations for mains, meters and services, as now claimed, are not seriously questioned by any of Defendants' witnesses, assuming the mileage of mains to be according to Complainant's figures.

Cost of Gas.

The Complainant presented a summary of its operations for the calendar year 1905 (marked as Exhibit 94), which was used as the basis of the calculations made by all the witnesses as to the cost of gas making. It is reproduced herewith, the various items being consecutively numbered for the purpose of convenient reference. This summary represents expenditures merely, and no account is made therein of income or receipts from any source, excepting *Residuals*, (Items Nos. 7 to 17). The amounts derived from these sources are deemed to be proper in an account of operating cost, as their

COMPLAINANT'S EXHIBIT 94.

Consolidated Gas Company of New York.

Summary of Operations for the Calendar Year 1905.

		Quantity.	Price per unit.	Amount.	Quantity per M c. f. made.	Cost per M c. f. made.	Cost per M c. f. sold.
1.	Coal: Bituminous—Tons	229,282.81	$3.18	$729,606.21	48.19	6.48	7.00
2.	Anthracite — "	106,024.68	4.36	462,680.25	22.82	4.34	4.44
3.	Boiler — "	10,399.67	3.67	38,156.43	2.19	0.36	0.37
4.	Cartage — "	.....	.....	18,222.89	.....	0.17	0.18
5.	Labor handling	.....	.....	49,150.07	.....	0.46	0.47
6.	Total	.....	.....	1,297,815.85	.....	12.17	12.46
7.	Residuals:						
8.	Coke—Loads	167,071.70	2.02	338,300.91	.....	3.17	3.25
9.	Less—Labor handling	.....	.....	35,678.39	.....	0.34	0.34
10.	Cartage	.....	.....	11,164.97	.....	0.10	0.11
11.	Net	.....	.....	291,457.55	.....	2.73	2.80
12.	Tar (Coal) Tons Carbonized	229,282.81	28.59	65,546.70	.....	0.62	0.63
13.	Ammoniacal Liquor (Lbs.)	4,896,886	01.34	65,849.65	.....	0.62	0.63
14.	Carbon	485,720	01.00	4,857.20	.....	0.04	0.05
15.	Spent Oxide	5,577,034	00.11	6,196.47	.....	0.06	0.06
16.	Oil Tar—Gallons	2,710,826	01.93	52,207.26	.....	0.49	0.50
17.	Total Residuals	.....	.....	486,114.83	.....	4.56	4.67
18.	**Net Total**	.....	.....	811,701.02	.....	7.61	7.79

Summary of Operations for the Calendar Year 1905—Continued.

	Quantity.	Price per unit.	Amount.	Quantity per F c. f. made.	Cost per M c. f. made.	Cost per M c. f. sold.
19. Coke used—Tons	19,892.54	$3.22	63,972.09	.....	0.60	0.61
20. Labor	.....	.....	1,293.31	.....	0.01	0.01
21. Cartage	.....	.....	43.87	.....	.....	.....
22. Total	.....	.....	65,309.27	.....	0.61	0.62
23. Naptha—Gallons	5,587	04.38	244.43	.....	.....	.....
24. Gas Oil— "	41,876,670	04.23	1,769,968.42	3.93	16.61	16.99
25. Fuel Oil— "	2,502	02.00	50.04	.....	.....	.....
26. Lime—Bushels	62,374	04.99	3,114.02	.....	0.03	0.03
27. Oxide— "	121,485	15.78	19,173.35	.....	0.18	0.18
28. Water—Cubic Feet	22,684,200	$1.00M.	22,684.20	.....	0.22	0.22
29. Fuel Oil (including Drip Oil Labor, if used in mfg.)	.....	.....	4,424.70	.....	0.04	0.04
30. Oil, Waste and Sundries	.....	.....	5,407.15	.....	0.05	0.06
31. Cartage	.....	.....	17,123.60	.....	0.16	0.17
32. Labor	.....	.....	382,632.04	.....	3.59	3.67
33. Net amount of Material & Labor	.....	.....	3,101,832.24	.....	29.10	29.77
34. Repairs to Apparatus	.....	.....	169,197.39	.....	1.59	1.62
35. do. Buildings	.....	.....	24,900.69	.....	0.23	0.24
36. do. Tools and Implements	.....	.....	16,228.48	.....	0.16	0.16
37. Expense	.....	.....	59,016.97	.....	0.55	0.57
38. Distribution	.....	.....	31,855.34	.....	0.30	0.31

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39. Experiments			3,030.08		0.03	0.03
40. Profit and Loss Adjustment			*7,508.39*		*0.07*	*0.07*
41. Distributing Station Expenses			56,538.57		0.53	0.54
42. Station Costs			3,455,091.37		32.42	33.17
43. Cost of Gas Mfg. under Agency Agreements			997,039.89		34.04	34.82
44. Total Cost of Holder			4,452,131.26		32.77	33.52
45. Expense			490,855.36			03.69
46. Distribution			281,524.12			02.12
47. Repairs to Gas Stoves			55,954.35			00.42
48. do. Mains			126,110.31			00.95
49. do. Services			89,033.46			00.67
50. do. Meters			172,925.52			01.30
51. do. Buildings			15,116.68			00.11
52. do. Tools and Implements			15,610.59			00.11
53. Street Lamps			289,259.09			02.18
54. Interest on Consumers' Deposits			51,391.52			00.39
55. Bad and Doubtful Debts			82,995.11			00.63
56. Profit and Loss Adjustment			*29,683.92*			*00.22*
57. Total Distribution			1,641,092.19			12.35
58. Expense—General Office			339,999.51			02.56
59. Vacations and Sickness			8,175.20			00.06
60. Automobiles			5,064.16			00.04
61. Advertising and Legal			105,800 02			00.80

Summary of Operations for the Calendar Year 1905—Continued.

	Quantity.	Price per unit.	Amount.	Quantity per M c. f. made.	Cost per M c. f. made.	Cost per M c. f. sold.
62. Real Estate Rents	.....	.....	42,674.71	.....	.....	00.32
63. Gas Companies' Mutual Aid Society	.....	.....	6,413.99	.....	.....	00.05
64. Superannuation	.....	.....	14,943.86	.....	.....	00.11
65. Insurance	.....	.....	54,031.83	.....	.....	00.41
66. Taxes	.....	.....	965,843.88	.....	.....	07.27
67. Contingent Expense (includes renewals)	.....	.....	1,328,316.37	.....	.....	10.00
						74.81
68. Total General Expenses	.....	.....	2,871,263.53	.....	.....	21.62
69. Fixed Charges	.....	.....	972,423.44	.....	.....	07.32
70. Total Operating	.....	.....	$9,936,910.42	.....	.....	74.81
71. Gas made at Consolidated Co.'s Stations			10,657,810,000			
72. " " " Other Co.'s Stations under Agcy. Agmt.			2,929,210,322			13,587,020,322
73. Gas sold—Made at Consolidated Co.'s Stations			10,419,461,426			
74. " " Other Co.'s Stations under Agcy. Agmt.			2,863,702,341			13,283,163,767
75. Excess make over sales (2.24%)						303,856,555
76. Gas Sales, cubic feet			13,283,163,767			

NOTE.—Figures in *italics* in red ink in original.

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331 production is the necessary result of the very process of gas making.

The expenditure of the various items shown on this statement is not questioned, excepting as to a portion of the Item No. 67, *Contingent Expenses (including renewals)*. There was no question also as to the propriety of allowing most of the items as proper elements of gas cost, and, on the other hand, all the witnesses agreed in making certain eliminations, notably Item No. 69, *Fixed Charges*, and varying portions of Item No. 66, *Taxes*. All agreed also in eliminating for the purposes of their computations as a whole, Item No. 67, *Contingent Expenses (including renewals)*, but each witness substituted in place thereof other figures, representing his views of a proper allowance for repairs, renewals, contingencies, etc.

The items as to which chief question was raised are as follows:

No. 47, Repairs to Gas Stoves.
No. 53, Street Lamps.
No. 54, Interest on Consumers' Deposits.
No. 58, General Office Expenses.
No. 61, Advertising and Legal Expenses.
No. 62, Real Estate Rents.
No. 66, Taxes.
No. 67, Contingent Expenses (including renewals).

Item 47. Repairs to Gas Stoves, $55.954.35:

For the purpose of increasing its sales the Complainant encourages the use by its customers of gas stoves, the repairs of which it looks after, as it does after the repairs of their other gas apparatus. The stoves are Complainant's property and it received rentals therefor during the year amounting to $122,322.60, less depreciation written off $54,954.98, leaving a net credit on account of stove income of $67,367.62.

The Defendants claim that instead of charging as a part of operating cost the amount of Item No. 47, $55,954.35, there should in fact be a credit of $11,413.27, being the difference between
332 that item and the rentals received, less depreciation.

The custom of renting stoves is not universal. A great many companies do not own their stoves, and yet are subject to expense for repairs to gas stoves used by their customers, the expense of which is charged to operating cost.

Complainant urges that its method of bookkeeping is the proper one because, if for any reason the Company should abandon the practice of renting its gas stoves, its receipts from this source would disappear, while the expenses would still remain, thereby apparently increasing the cost of gas, while as matter of fact there would be no increase in such cost but merely a decrease in income.

It is unquestioned that the ultimate result of either method is the same in arriving at the net operating cost. The evidence indicates that Complainant's method of bookkeeping is supported by the form of report adopted by the New York and Massachusetts Gas Commissions, the American Gas Light Association and various

British Companies, although a different method is apparently followed by the Buffalo Gas Company.

Under these circumstances, I see no sufficient reason for eliminating the item in question.

Item 53. Street Lamps, $289,259.09:

This represents the actual expenditures of the Complainant in caring for the public lamps under its contracts with the City, less all receipts by the Company for repairs independently charged.

Taking as an illustration a single contract (City's Exhibit 4), it appears that the lamps are furnished to the City for a lump sum, covering not only the gas delivered but

"the lighting, extinguishing, cleaning, repairing, reglazing, and painting of lanterns and lamp irons, the painting of lamp posts and cross-heads, the furnishing and repairing and replacing of
333 cocks, tubes and burners; the replacing of crossheads, lamp irons and lanterns and the replacing and repairing of lamp posts when owned by the contractor."

In a subsequent paragraph the Company agrees to do certain work in connection with "repairs of lamp posts and erection of new lamp posts" at a certain specified charge for each service.

The amount received from the City, including both gas sold and maintenance of lamps, appears in the income of the Company as a receipt from gas sales.

This involves the same principle as the preceding item. In this instance also complainants' method has the sanction of abundant authority in the practice followed elsewhere and I find no reason to question its propriety.

Item 54. Interest on Consumers' Deposits, $51,391.52:

Complainant, like most gas companies, is empowered by law to require a deposit from every consumer in order to protect itself against loss, but is required to pay legal interest thereon. The proof shows that the amount of such deposits practically forms a part of Complainant's working capital, and as specific allowance is elsewhere made for the amount of working capital deemed necessary for the conduct of its business, this item of interest on a portion thereof should not be allowed as part of the operating cost.

Item 58. General Office Expense, $339,999.51.

Item 61. Advertising and Legal Expenses, $105,800.02:

One of Defendants' witnesses excluded from Item 58 the sum of $25,671.74, representing disbursements in connection with legislative investigations, and from Item 61 the sum of $63,401.65, covering expenses growing out of franchise tax litigation.

No sufficient reason was shown why expenses of this character, which are common to the conduct of the business of large corporations, should not be treated as a part of Operating Expenses.
334 Such appears to be the general practice in this country, and the form of gas reports prescribed by the British Government expressly recognizes their propriety.

Item 62. Real Estate Rents, $42,674.71:

This represents rentals payable by Complainant for premises leased by it and occupied in the conduct of its business. *Per contra,* there appears in its miscellaneous income the amount which receives for real estate leased by it to other parties, viz., $37,408.88.

This question presented is merely one of book-keeping. My conclusion regarding it is the same as in the case of Items 47 and 53 *ante,* and for the same reasons.

Item No. 66. Taxes, $965,843.88:

This is made up as follows:

Taxes on Real Estate	$179,778.95	
" " Personal Property	88,839.00	
" " Special Franchises	406,909.23	
" " Mains, Pipes, etc	14.91	
" " Income from gas business	70,538.02	
		$746,080.11
Taxes on Income from other Companies' Securities	$5,257.48	
" on Dividends in excess of 4 per cent. on $38,643,590,14, Stock invested in Securities	57,965.39	
" " $41,356,409.86, Stock in Gas Business	62,034.61	
Interest on Unpaid Taxes	94,506.29	
		219,763.77
Total		$965,843.88

In making their computations as to cost of gas, all the witnesses seem to agree in including the above amount of $746,080.11,
335 and excluding the items, "Taxes on Income from other Companies' Securities," and "Taxes on Dividends in Excess of 4 per cent. on Stock Invested in Securities." The Defendants' witnesses however further exclude the items "Taxes on Stock in Gas Business" and "Interest on Unpaid Taxes."

No sufficient reason is perceived for the rejection of either of these items. The former is a tax assessed against the corporation under the terms of Section 186 of the Tax Law (Cumming & Gilbert's General Laws, page 3984). It is in no sense a charge against individual stockholders. The latter covers taxes chiefly on franchises, the validity of which is in controversy in the courts. Assuming that the taxes could be paid pending such litigation, under protest, and Complainant's rights fully protected, it is still apparent that in the event of ultimate success the Complainant would be subjected to more or less expense before the amount of such payment could be recovered. As it has seen fit to contest the tax pursuant to the advice of counsel, the interest meanwhile accruing would seem to be as much a necessary expense as the costs of court fees of counsel. It is not claimed or shown that the litigation was, in any case, unreasonable or improvident.

Item No. 67. Contingent Expenses, Including Renewals, $1,328,316.37:

All the witnesses agree, when making their computations of cost, in substituting for the above item their own estimates covering various elements embraced therein. It is therefore necessary to note exactly what it represents on the books of the Company. The proofs show that it consists of an arbitrary charge of 10 cents per thousand feet of gas sold, based upon the total sales of 1905. Its purpose according to Mr. Addicks was to cover

"any minor extensions, renewals on account of extraordinary wear and tear, depreciation not covered by repairs, all supersession, accidents of larger moments than usual, fluctuations in the busi-
336 ness, changes in the cost of all materials, and electrolysis and other contingencies."

In amplification of this answer it was stated that, under modern conditions, there is a new element of danger in the gas business by reason of the subways. The risk of explosions is much increased, particularly during the period of construction, and increased expense for inspection is required. As an illustration of risk of this sort, the witnesses have cited a comparatively recent gas explosion in the Boston subway, involving an expense equal to 10 cents per thousand on the entire output of the Boston Gas Light Company for four years.

Mr. Carter said:

"I might say that we took into account such considerations as fluctuation in the cost of material, liability to serious and expensive accidents, having in mind the case of a very grave one which occurred in Boston not long ago which cost the Company there a great deal of money to settle in the way of damages; the possibility of variations in the volume of the business might render the presence of such a fund very serviceable to the Company; and many considerations of that sort were canvassed very thoroughly in determining the amount that we should reserve.

Q. Then as I understand, you did this to accumulate your surplus earnings as against a change in the volume of business or some extraordinary occurrence; it had nothing to do with the ordinary operations?

A. Our intent was of course to cover by that ten cents such extraordinary loss as the Company would sustain in the removal of the plant to Astoria, among other things, as well as to cover the cost of current replacements and renewals that would take place independently of any transfer of the plant to Astoria from New York."

This account was first opened in May, 1905.

337 There was posted into it monthly as a credit the arbitrary amount of 10c. per thousand feet of gas sales, and at the close of the year there were debited against the account the sum of $282,219.67, representing depreciation charges, chiefly renewals and replacements.

This was done pursuant to resolution of the Board of Directors as follows:

Resolved, that the officers of this Company be, and they hereby are, authorized and directed to apply from the amount now at the credit of Renewal and Contingency Account, the sum of $282,219.67 to cover the amount of loss and depreciation in, or cost of replacement of, certain items of this company's property specified in a memorandum signed by the Secretary of this Company, the same to be entered in detail upon its books.

Plant	$3,424.00
For the original cost of sundry plant and apparatus dismantled during the year, to make room for new plant and apparatus plus the cost of dismantling, less what was recovered from the sale of old apparatus as scrap or from its use as repair material. Also the book value of plant and apparatus sold, less the amount recovered.	
Mains	90,561.54
For the book value of mains abandoned during the year and the book values of mains replaced during the year with mains of larger capacity, less the value as stock of the old mains taken up.	
Services	37,401.00
For the book value of services taken up or cut off and abandoned in the street during the year.	
Meters	25,646.20
For the book value of meters condemned, lost or destroyed during the year.	
Meters, Cocks and Connections	31,570.89
For the depreciation and replacement during the year, estimated at 10 per cent. of the book value.	
Horses, Wagons and Harness	5,338.62
For the depreciation and replacement during the year, estimated at 20 per cent. of the book value.	
Office Furniture and Fixtures	8,140.87
For the depreciation and replacement during the year, estimated at 20 per cent. of the book value.	
Tools and Implements	24,483.65
For the depreciation and replacement during the year, estimated at 40 per cent. of the book value.	

Gas Stoves	54,954.98
For the depreciation and replacement during the year, estimated at 20 per cent. of the book value.	
Automobiles	697.92
For the depreciation and replacement during the year, estimated at 10 per cent. of the book value.	
	$282,219.67

This account therefore consists merely of bookkeeping entries and in one sense does not show the actual expenditure of any money. It does, however, represent an actual expenditure in the sense that the replacements and renewals thus charged as depreciation form a part of the Company's "construction account," all of which represents money actually expended. In other words, being an account for depreciation no item of expenditure directly appears therein but all expenditures for renewals and replacements must necessarily be shown in the construction account. Thus, in said $282,219.67, the first item, $3,424, represents items of "plant" abandoned, whereas the Company's balance sheet for the year shows that its plant construction for 1905 amounted to $403,255.53, resulting in a net increase to account of plant, after making good said depreciation item, of $399,831.53. The expenditure for construction account, therefore, taken as a whole for 1905, was not only sufficient to restore
339 the property account for that year to the point it occupied before said $282,219.67 was charged off, but left it at a net higher figure on December 31st, 1905, than it was shown to be by the balance sheet for the previous year.

Item 67, therefore, may to the extent of $282,219.67 be regarded as representing complainant's expenditures for current renewals and replacements during 1905, necessary (in addition to the current repairs covered by Items 34-36 and 47-52 of Ex. 94) for the maintenance of its plants and property. Such expenditures amounted on the basis of sales to 2.12c. per thousand feet, and the question presented is whether or not sufficient ground has been shown for the allowance of the remaining 7.88c. necessary to bring this amount up to the 10c. per thousand feet arbitrarily set aside in Item 67.

Complainant's claim is based on the necessity of a sufficient reserve fund to cover "final renewals" and "contingencies." The terms have been used more or less indiscriminately by the witnesses. They cover, however, distinctly different elements and have only one feature in common, in which they both relate to future requirements, for which, according to Complainant's contention, experience has shown that provision must be seasonably made.

(1) Final renewals:

A "final renewal" fund is in addition to *current* expenditures for "repairs and renewals," such as are embraced in Items 34 to 36 and 47 to 52 of Exhibit 94, and the current replacement charge of 2.12 per thousand feet, included in Item No. 67. It is intended (*a*) to cover

physical deterioration which has taken place and which has not been met, by current repairs and renewals, and (*b*) to provide for the loss or displacement of plants, in whole or in part, in the future from any cause.

For example, in illustration of (*a*), Mr. Mayer found the value of Complainant's plants new to be $16,137,477, and as now existing to be only $15,532,489, in spite of the expenditures made for current "repairs and renewals." The balance ($604,988,) which it
340 would be necessary to expend some time to make the plants as good as new would be covered by a "final renewal" provision; as to (*b*), if Complainant's manufacturing capacity should be removed to Astoria on completion of the second and subsequent Units there, it would involve the abandonment of working and efficient apparatus and buildings in Manhattan, of a value as claimed of upwards of $10,000,000. Such loss also would be covered by the "final renewal" charge.

Of course the requirement of such "final renewal" provision affects in no way the present value or efficiency of the plants of the Company as operating concerns, except to the extent of the "repairs" ($604,988 above mentioned), which would be required to make the operating plant as good as new.

This intangible or general depreciation of plants which it is necessary to provide for by such "final renewal" fund was well described in the Columbus Railway and Light Company case already cited:

"A building may be kept in as good repair as possible, and the cost of such repair can be ascertained, and is ascertained and legitimately added to the operating expense. But in however good repair a building may be maintained, in addition to this cost there is a gradual depreciation of the value of the building itself arising from lapse of time in spite of fresh paint, new roof, new bracings, repaired joists, etc., which eventually, according to circumstances, renders the building useless for the purpose for which it was constructed. In the case of buildings this intangible depreciation is naturally slower than the depreciation of its contents in the shape of machinery, or the depreciation of wires, poles, conduits, and distributing system of a property such as Complainant's.

A machine may be kept constantly in repair so far as skill and ingenuity can keep it in repair, but in spite of such repairs the machine eventually will wear out, and become useless for its purpose. Machinery and appliances devoted to any purpose in which the state of the art, or the condition of manufacture have not been brought to absolute perfection, so that there can be no further
341 progress, is subject also, and always, to the fact that newer and better appliances, either furnishing service or product at less cost, or furnishing service or product of better quality, or of more constant value to the consumer, may be at any time invented, thereby compelling the producer to cast off the old machine and buy the new one, or to suffer loss of custom, or incur increased cost of product, by not so doing. For these reasons a machine today which is worth $10,000, may tomorrow, in the exercise of good judgment, have to be sold for scrap.

The pole line of an electric company may be constantly painted

and watched with the utmost care, all that expense being charged to the operating expenses, but in addition to this, there is necessarily a deterioration and decay of the pole from year to year that cannot be prevented by any such care."

(2) Reserve Fund:

The purpose of this fund, as above stated, is to cover such contingencies as increase in cost of labor and materials, hazards of strikes, damage from electrolysis or by reason of explosions, and unforeseen events of any description which may tend to increase the cost of production.

As illustrating the necessity of providing for such contingencies, complainant has called attention to three specific items developed during the hearing, all of which represent an increased cost of manufacture:

1. Additional cost of enrichment of gas. By Chapter 737 Laws of 1905 the illuminating power of gas was fixed at 22 instead of 20 candle power to take effect on July 1st of that year. The cost of production for 1905 as shown by Ex. 94, covered the expense of enrichment for only six months while for a full year would require the addition of 1.83c per thousand feet to the cost as stated.

2. The taxes for 1906 were increased over those of 1905 to an extent amounting to 1.13c per thousand feet of gas.

3. Wages have been increased during the last year to an
342 extent equivalent to an additional cost of 1.40c per thousand feet.

The Defendants urge that the arbitrary allowance of 10 cents per thousand feet represented by item 67 is wholly unjustifiable by the necessities of complainant's business; that such an account has no warrant in the experience of twenty years, but was opened merely as an afterthought in consequence of the Legislative investigation of 1905, and for the purpose of swelling the apparent cost of gas. To quote the language of counsel

"it represents a re-charge for a depreciation of plant that has been protected by a depreciation charge for twenty years; it represents 'depreciation' that has not accrued; it represents depreciation that may never accrue, and doubtless such as stated will never accrue; it represents fake depreciation—an afterthought, trumped up to swell the cost and justify over-charge, and it should so far as it is speculative be rejected."

If the account in question is in itself a proper one, the fact that it was not opened until 1905 has little bearing on the issues now to be determined. That it is proper, so far as regards the amount expended for current renewals and replacements is not seriously disputed. As to "final renewals" (or, as sometimes called "general depreciation") and "contingencies," the propriety of an allowance is fully established by the evidence and, to a greater or less extent, conceded by Defendants' witnesses. Counsel have cited two decisions of State Courts to the contrary (*Cedar Rapids Water Co. vs. Cedar Rapids*, 118 Iowa, 234, 263; *San Diego Water Co. vs. City of San Diego*, 118 California, 556, 583), but those cases are at vari-

ance with the views frequently expressed in the Federal Court (*Milwaukee &c. Co. vs. Milwaukee,* 87 Fed. Rep., 577, 582; *Spring Valley Water Works Company vs. San Francisco,* 124 Fed Rep., 574, 599).

343 They are also at variance with the common practice of well managed industrial corporations. No reason is apparent why such a rule should not be followed in the case of a public service corporation as well as any other. The propriety of so dong has been recognized in Massachusetts, where the percentage of intangible depreciation has been definitely fixed by statute, so far as municipal electric lighting companies are concerned, at 3 per cent. annually upon the total cost of the plant. A similar practice prevails in England where there is set aside an annual percentage based on the structural value of the assets to cover not only depreciation but contingencies.

The only question, therefore, to be determined is as to the extent to which an allowance should be made for this purpose and, in considering this question, reference must be had in some detail to the method pursued by the different witnesses in preparing their cost computations.

The aggregate expenditure for repairs, as shown by Exhibit 94 (Items 34 to 36 and 47 to 52 inclusive), amounted in 1905 to $685,077.47, or 5.58 cents per thousand feet. Adding this the amount of replacements and renewals included in Item 67 (2.12 cents) gives a total cost for 1905, for repairs and renewals, of 7.70 cents per thousand feet.* This is considerably less than Complainant's average expenditures for like purposes since its organization.

Between November, 1884, and January, 1906, such average expenditure was at the rate of 10.89 cents per thousand feet. During the first eleven years of that period the average was at the rate of 12.25 as against an average during the last eleven years of only 9.73 cents. It is urged by Complainant that, in order to properly determine the operating cost of gas, it is necessary to take

344 the average expenditures for repairs, replacements and renewals covering a period of years. A company may in one year abandon, or suffer damage to, considerable quantities of apparatus with the result of placing the repairs and renewals for that year at a very high figure, whereas in the following year there may be a minimum of loss and the repairs and renewals be much less. Accordingly, Complainant's witnesses in their computations have added to the total amount expended for this purpose, as shown by Exhibit 94, such further amount as was necessary, in their judgment, to bring the expenditure up to the normal rate, as shown by the average of earlier years. Dr. Humphreys took an average of the period between 1884 and 1905, which he placed at 10.60 cents. Mr. Addicks' selected the average of the last five years during which the Company manufactured all its own gas; to wit, 1894 to 1899, during which period the average was 12.31 cents.

*NOTE.—According to State's Exhibit L the expenditures of 1905 for these purposes were $974,289.65, or 7.34 cents per thousand cubic feet upon complainant's total sales. The latter figure is used by several of the witnesses.

The propriety of this method is supported to some extent by Defendants' witnesses: Professor Bemis used the average of 10.89 cents for the last twenty years preceding 1905. It also appeared that the propriety of taking such an average, instead of expenditures for any particular year, was recognized by the State Gas Commission in its decision fixing the price of gas at 80 cents, and by a Committee of the Chicago Common Council, investigating the cost of gas, in that City.

It is, however, claimed by Defendants' counsel that as the operations of the Complainant for the year 1905 have been selected as material for a study of gas cost, the figures must be regarded as typical in every respect, and that no exception should be made in the case of repairs and renewals, notwithstanding the evidence may show they are not fairly representative of the actual cost to the Company in previous years. It is also suggested, and with much more force, that, if any average is to be taken, it should be the longer period used by Dr. Humphreys and Professor Bemis, instead of the short period selected by Mr. Addicks, covering the years 1895 to 1899 inclusive. This is especially true, in view of
345 the fact that most of the water gas apparatus has been built within the last five years and is thoroughly modern in all respects.

It is also urged that if Complainant is entitled to charge operating expenses to depreciation to cover renewals, actual and estimated, it should, on the other hand, be compelled to credit the operating account or debit the investment account with the appreciation of its real estate values. The force of this argument is not apparent. Under the authorities, the Complainant is entitled to a return upon the value of its property "at the time it is being used for the public" (*San Diego Land & Town Company vs. National City*, 174 U. S., 139). Whatever enhancement there may have been in its value since the date of purchase was the result of no efforts on the part of consumers of gas, and they are not equitably entitled to a return thereon. Whether it was the result of mere good fortune or was due to the shrewdness and foresight of the management of the Company is immaterial. In either case, the justice of permitting the general public to share its benefits at the expense of Complainant's stockholders is not apparent.

As to the amount to be allowed as a reserve for contingencies Dr. Humphreys advocates the allowance of 5 cents per thousand on sales for the accumulation of a fund which shall be equal to 10 per cent. of the capital.

Professor Bemis appears to have in other proceedings admitted the propriety of an allowance of 3 cents per thousand feet as a reserve fund. He did not do so in the present proceeding, however, on the assumption that the 10.89 cents, representing the average "repairs and renewals" for a period of the past twenty years, went in part to increase the property of the Company. In other words, that earnings formed a part of such "repairs and renewals" and had gone to swell the property account. In this assumption he appears to have been in error.

Mr. Addicks, in his computation, added for a reserve or contingent fund 3 cents per thousand.

346 Mr. Marks made no allowance for this purpose on the ground that, in his view, the Company had sufficient surplus to provide the necessary contingent fund if it had not applied the same to the purchase of the securities of other lighting companies. The force of this suggestion is not apparent, in view of the conceded fact that the securities of other lighting companies owned by the Complainant were not paid for by any surplus in its possession, but were acquired by the issue of increased stock beyond its original capital. In a work written by the witness, entitled "Finances of Gas and Electric Light and Power Enterprises," he advocates 15 per cent. on the structural value of gas property to cover return on capital and a fund for future contingencies. Assuming 10 per cent. as a dividend rate, and taking 5 per cent. for contingencies, this would amount on the basis of even so low a valuation as $25,000,000 for the structural value of Complainant's property to over 9 cents per thousand feet of sales. In fact, the witness admitted that assuming Complaint to have a return only upon the value of its assets, it would be entitled to an allowance of a reserve or contingent fund up to the amount of about 10 per cent. of the capitalization or structural value of the works, in accordance with the English custom.

The cost computations of the different witnesses may be analyzed and compared as follows:

Mr. ADDICKS:

Cost as per Complainant's Exhibit 94		74.81c.
From this he deducts fixed charges	7.32c.	
Taxes, based on dividends on the portion of the Company's stock, invested in securities of other Companies	.48c.	
Item, "Contingent expense, including renewals and replacements"	10. c.	
		17.80c.
		57.01c.
To this he adds depreciation items (or "replacements"), actually included in said 10.c. item last named		2.12c.
Amount without adjustments		59.13c.
347 To this he adds for cost of enrichment, due to 22 candle power law, for which the Gas Commission allowed 1.81c. (Bill of Complaint, p. 51)		1.83c.
The "repairs and renewals" of the Company for the last 5 years (1894-9), during which it manufactured all the gas it sold, was per M	12.31c.	
To bring 1905 up to average of those 5 years, in view of the completion of the Astoria coal gas Unit, he adds the difference between said amount and the abnormally low "repairs and renewals" for 1905	7.34c.	
		4.97c.

Less certain repairs of other Companies, already included in gas delivered under agency agreements	.35c.	
		4.62c.
He then adds for increased cost of labor, anticipated when he made the computation, but since actually realized, according to the testimony to the extent of 1.40c. per M., say		.78c.
To this he adds for a "reserve" or contingent fund.....		3. c.
Net chargeable to cost for year.....		69.36c.

On the subject of income, Mr. Addicks shows the following results:

Receipts from gas, in lump sum, which also covers maintenance of public lamps.....	102.03c.
Dividends from National Coke & Coal Company, in which $50,000 of capital was invested.....	.04c.
Miscellaneous income, including stove rents, discounts, real estate rentals and sundries, being all the other receipts of the Company, except from securities of other lighting Companies held	1.30c.
	103.37c.
Available for return on capital.....	34.01c.
348 Deduct fixed charges, being total payments of interest on Debentures, *less* any amounts received from investment of proceeds of Debentures, so far as they are not already turned into plant.....	7.32 c.
	26.69 c.
Deduct 20c. per M., if 80c. rate were assumed.....	20. c.
Remainder, applicable to dividends, assuming 80c. rate..	6.69 c.

Dr. HUMPHREYS:

He starts with Station cost of all the gas sold by Complainant in the holder (Ex. 94—33.52c.) at.....	33.517c.
He then adds "distribution" expenses (Ex. 94—12.35c) at	12.355c.
And "general" expenses (Ex. 94—21.62c.) at.....	21.616c.
Total, excluding fixed charges.....	67.488c.

From this he deducts taxes paid on dividends relating to the portion of Complainant's stock invested in securities of other Companies	.476c.
Net cost to this point	67.012c.
He then deducts, for the purpose of substituting average figures therefor, namely, certain charges, which appear in Ex. 94, *repairs and renewals* appearing in Exhibit 94, including the 10c. charge (Item 67), a part of which is "contingent," being in total	15.210c.
Cost at burner exclusive of Repairs, Final Renewals (Depreciation) and contingencies, excluding extraordinary hazards	51.802c.
He finds that the average expenditures for *"Repairs"* from 1884-1905 are 7.5858c.	
And that the average charge for *Renewals* (Depreciation) for the same period, based on this experience should be 6.5592c.	
Total for repairs, renewals & depreciation	14.145c.
349 Cost at burner with no reserve for contingencies	65.947c.
Reserve to cover contingencies, as explained in his testimony (pp. 1946-7)	5. c.
Total cost, including reserve	70.947c.

Turning to the income side of the account, Dr. Humphreys makes the following computations:

Receipts from gas, including lamp maintenance	102.0277c.
Miscellaneous income, including stove discounts, real estate rentals and sundries, and dividends from National Coal & Coke Company	1.3378c.
Total income from gas business	103.365 c.
Profit to cover return on capital (p. 1944)	32.418 c.

Mr. MARKS:

Cost as per Exhibit 94		74.81c.
Deduct:		
Fixed Charges		7.32c.
Taxes	0.48 0.47 0.71	1.66c.
Contingent		10.00c.
Street Lamps		2.18c.
Int. on Consumers Deposits		0.39c.

Repairs Gas Stoves	....	0.42c.	
Stove Rents	0.92		
" Repairs, already deducted	0.42	0.50c.	
Real Estate rents	....	0.28c.	
			22.75c.
			52.06c.

Add:

Renewals—Nominal Year ending October 31, 1905	1.45c.
Balance for cost of gas	53.51c.

350 This would leave the other side of the account as follows:

Receipts—Gas sales		102.03c.	
Street lamp, maintenance		2.18c.	
			99.85c.
Misc. Income		1.34	
Less stove rents	.92		
Real estate rents	.28	1.20	
			.14c.
Net income			99.99c.
Left for return on capital			46.52c.

Making certain corrections in the above in accordance with the views hereinbefore expressed the result is as follows:

Cost of gas, excluding fixed charges, as per Mr. Marks	53.51c.
He has deducted not only taxes based on dividends paid on Complainant's stock, invested in securities of other companies (.48c.), as did Mr. Addicks and Dr. Humphreys; but also taxes based on dividends paid on stock, invested in the gas business (.47c.), and interest on deferred franchise taxes in litigation (.71c.), both of which are proper charges to operating expenses. There should therefore be added .47c. and .71c	1.18c.
He has also excluded maintenance of street lamps, which should be added	2.18c.
He also excludes repairs to gas stoves, which should be added	.42c.
He has not only deducted repairs to gas stoves but also deducted an item of income not appearing in Exhibit 94,—to wit, the difference between the expense item, "Repairs to gas stoves," (.42c.), and the income item of "stove rents" (.92c.), or, 50c. Restoring this item, there should be added	.50c.

Having deducted the 10c. "Contingent and renewal item, a part of which represented actual items of "renewals" (Depreciation), he adds only 1.145c. for renewals, taking the amount for the *nominal* year ending October 31, 1905; whereas the actual amount for the *calendar* year was 2.12c. The difference should be added..... .67c.

Total ..... 58.88c.

351 If for purposes of illustration there are added to the above certain items insisted upon by complainant the result will be:

Corrected cost as above.....	58.88
Add, to equalize the repairs and renewals of 1905 (7.34, according to Mr. Addicks), with the average for twenty years, 10.89	3.55
Add, for final renewal or reserve fund, 5% on an assumed structural value of $25,000,000 for tangible assets (the payment of which under certain conditions Mr. Marks admitted)	9.
Add as typical contingencies, additional cost of enrichment, 1.81; increased cost of labor, 1.40; increase in taxes, 1.13.	4.34
	75.77

Professor BEMIS:

His computations, arranged in tabular form, are as follows:

	Operating cost according to Exhibit 94.	Operating cost according to Bemis' preliminary estimate.	Operating cost according to Bemis with "station cost" and item, "other expenses," as actually expended.
Station Cost (Item 44).....	33.52c.	26.68c.	33.52c.
Repairs on Distribution System.	3.56c.	3.56c.	3.56c.
Taxes	7.27c.	6.08c.	6.08c.
Contingent and Renewals..	10.00c.	5.31c.	5.31c.
Other Expenses aside from excluded items.....	9.45c.	7.00c.	9.45c.
	63.80c.	48.63c.	57.92c.
Excluded items:			
Lamps ..... 1.96c.			
Miscellaneous income 1.34			
Fixed charges..... 7.32			
Interest 0.39			
	11.01c.		
	74.81c.		

352 As seen above Prof. Bemis includes in this computation, in place of the 10c. per thousand "contingencies and renewals," an allowance of 5.31c., in order to bring the repairs and renewals for 1905 up to the average for the previous twenty years.

Looking to the other side of the account, net income must on Professor Bemis' theory, be computed as follows:

Total including gas sales, miscellaneous income and dividend on National Coal & Coke Co., (*except* .22c. for street lamps, *i. e.* Item 53, 21.18—1.96=.22c., excluded by Prof. Bemis)			103.15c.
Deductions:			
Public Lamps	1.96c.		
Miscellaneous Income	1.34	3.30	99.85c.
Profit for return on capital			41.93c.

Professor Bemis' station cost, 26.68, is purely hypothetical, being based on the assumption of possible lower cost of oil. This is not a present fact, however, and it is conceded that the actual station cost is as stated in Exhibit 94. So also as regards "other expenses aside from excluded items." It was not shown that this item was excessive in any respect and the 7.00 c. in the second column is entirely hypothetical. For purposes of comparison, therefore, it is proper to start with the total operating cost, as stated in the third column above ..... 57.92 cents.

Professor Bemis allows taxes at 6.08 c., only, excluding 1.19 c. from the amount shown on Exhibit 94 (Item 66). The amount so excluded represents the taxes based on dividends on the Company's stock invested in securities of other companies .48, which ought properly to be deducted, and .71 c. interest accrued on deferred franchise taxes in litigation which ought to be allowed. There should accordingly be added ..... .71 "

He also excludes the charge for maintenance of lamps to the extent of 1.96 (having allowed .22 c.). This item is also to be allowed, and there should be added ..... 1.96 "

353 The next item termed "excluded" is "miscellaneous income" of 1.34c. This, however, cannot be said to have been excluded from Exhibit 94, for it was never included therein. On the contrary, it appeared in the income account and has no proper place in an account of expenditures. It should accordingly, be restored..... 1.34 "

Cost, as thus far computed..... 61.93 "

Adding to the above the items claimed by Complainant in support of Item 67, namely, gas enrichment, increased labor and increased taxes, would make a further expense of	3.73 "
In allowing for enrichment, as above, the amount computed by Professor Bemis is two-thirds of the 1.81 c. as claimed by Complainant.	
If further there be added for reserve fund, as allowed elsewhere by Professor Bemis, there would appear an additional expense of	3.00 "
Making a total of	68.66 "

A computation of cost was also made by Mr. Hall, an expert accountant who examined Complainant's books on behalf of Defendants, but it is not deemed profitable to analyze the same, as, to be of any value for purposes of comparison, it requires adjustment in considerable detail of various differences due to questions of bookkeeping.

After careful consideration of the evidence I have reached the conclusion that a fair computation of cost is as follows:

Cost per thousand cubic feet of sale, as per Exhibit 94			74.81c.
Deduct:			
Item 69, Fixed Charges	7.32c.		
From Item 66, Taxes computed on excess Dividends paid on stock invested in securities of other lighting companies	.48 "		
354 Item 54, Interest on Consumers' deposits		.39c.	
There should also be a deduction from Item 43, Cost of Gas manufactured under Agency Agreement, representing the 10 per cent. in excess of the cost of gas paid by Complainant to the subsidiary companies. This was deducted only by the witness Hall, and represents an expense per thousand cubic feet of	1.08c.		
Less, however, an allowance for proportionate station and distributing expense in connection with the gas so bought, of	.30c.		
Making a net deduction of		.78c.	8.97 "
Net Total			65.84c.

I am satisfied that the charge of 10 cents per thousand feet for "contingent expenses," including renewals and replacements, as shown by Item 67, is not excessive but, on the other hand, rather conservative. I have not deemed it necessary to differentiate between the amount to be allowed for final renewals and for contingencies, nor to determine that any fixed amount should be added to the current expenditures for repairs and renewals to bring them up to the average of former years. It is sufficient to say on this subject that the annual expenses for repairs and renewals have been very considerably less per thousand feet since the year 1900 than during the period between 1884 and 1899 inclusive. The renewals for 1903 were $237,576.96 as against $282,219.67 for 1905. With this single exception, the renewal charges for the five years
355 from 1900 to 1904 inclusive, were very considerably larger than for the year 1905. The testimony as to amount of depreciation now observable in the plants, or for which allowance should be made in appraising their value, indicates with reasonable certainty that the annual expense for renewals and replacements is likely to be over, rather than under, the 2.12 cents per thousand of the year 1905. This takes into account no extraordinary charge due to abandonment or "scrapping" of plant, in consequence of anticipated removal at some later date to Astoria.

As regards the elements to be taken into account in fixing a proper amount of reserve for contingencies, the direct testimony was confined chiefly to the matter of electrolysis. That this is a danger which may be reasonably apprehended is evident from the fact that it has received very considerable attention from electrical experts throughout the country and has been made the subject of special investigations on behalf of interests having capital invested in sub-surface construction. No special damage has been shown to have thus far resulted in this City, and the evidence indicates that all possible precautions are being taken to prevent it and with a reasonable assurance of success. In view, however, of the increasing number of electrical installations now in progress in this City, with currents of unusual power, it cannot be wholly disregarded. The danger of explosion is more immediate. Experience has shown that such catastrophies are not at all uncommon in the experience of this and other Companies and may occur entirely without fault of the Companies' servants. Under existing conditions, the chance of their occurrence is likely to increase rather than decrease. It is also apparent that, in view of the increasing number of sub-surface structures in New York City, the expenses to which Complainant must be subject in the care and maintenance of its mains and connections are likely to increase, and this fact, in connection with the continued rise in the price of labor and materials, indicates strongly the necessity in prudent corporate management for maintaining a reserve in excess of the actual expenditures called for by
356 known requirements.

Suggested Economies:

While the various witnesses, with the exception of Professor Bemis, assumed the actual manufacturing cost to the company to be as

shown by the expenditures set forth in Exhibit 94, the record contains suggestions of various economies which, as Defendants claim, would tend to reduce the cost of production. The items chiefly criticised formed part of Item No. 42, "Station Cost", and consisted of the cost of oil, on the one hand, and the price received for residuals (chiefly coke), on the other hand. It is also suggested that Complainant maintains excessive candle power. The testimony on these subjects was somewhat voluminous and need not be reviewed in detail.

Oil:

It appears that Complainant purchases its oil from the Standard Oil Company under a contract made November 1st, 1905, calling for the delivery of 255,000,000 gallons of oil within two years and eight months thereafter. Oil is delivered under said contract not only to the Complainant, but a portion is delivered to the New Amsterdam, Standard and Central Union Companies, in whose behalf as well as its own the Complainant was acting in making the contract, pursuant to an arrangement with their officers. The Mutual made a separate contract.

The contract for the Consolidated Company calls for 40% to 45% 34-Beaumé oil, and from 60% to 55% of 28-degree oil; and the obligations imposed on the Standard Oil Company are heavy, involving the delivery of the higher grade oil within the winter months exclusively, thereby requiring a large storage capacity; besides which the oil must be "homogeneous," that is to say, made up of straight run oils sufficiently near in maximum and minimum gravity to produce satisfactory results.

357 The price for the 34° oil is 4.875c. per gallon and for the 28° is 4.29c. per gallon.

Complainant's officers testified that these prices were obtained after some considerable negotiation and were the best that could be procured. The proof is convincing that the Standard Oil Company, which controls in one way or another, practically 90 per cent. of the gas oil of the United States, so far as the consumer is concerned, is the only producer capable of delivering to the Complainant the oil in such quantities and of such qualities as the necessities of its business require. It is also conceded that under the peculiar nature of Complainant's business, the absolute certainty of being able to receive its supplies under every contingency is a most important consideration. The Standard Oil Company not only has large storage facilities in the vicinity of New York Harbour, but a pipe line to tidewater. Even assuming that an adequate supply of oil of proper quality could be obtained from independent producers, the proof shows that the Complainant would be obliged in prudence to provide an assured storage capacity for at least ninety days' supply, and to establish a system of barges, lighters and other transportation facilities to distribute this oil as required. As now received, it is delivered at the Company's docks in the Borough of Manhattan, so that the price paid includes both storage and transportation, which otherwise would be a matter of expense to the Company.

The requirements of the Act (Chapter 736 of the Laws of 1905) prescribing 22-candle power, necessitates the use of a high grade oil in the winter months. The testimony is practically undisputed that a higher gravity oil is more efficient in carrying illuminants in cold weather than oil of a lower grade. It would appear further that form the standpoint of economy the greater efficiency of the higher grade oil more than offsets the difference in its cost per gallon.

There is no satisfactory evidence that oil of the grade used by Complainant could be delivered by any independent operator
358 at a price substantially less than the Complainant now pays; nor, making due allowance for varying local conditions and differences in grade, is there any satisfactory evidence that the price paid by Complainant is on the whole excessive as compared with that paid by various other companies to which reference was made.

Coke:

It is claimed by Defendants that the price received by Complainant for its coke, $4.71 per net ton delivered, is insufficient. Complainant asserts it to be a favorable price when compared with the price of anthracite in this market and at all events, to be the highest price obtainable here. It is explained that it is impossible to get the same price for coke in New York as in Western cities where anthracite is scarce or unknown, and coke is the only clean fuel; also that it is not practicable to ship it to any distance because, by reason of its brittle character, its value is rapidly deteriorated by handling and transportation. These suggestions were not met by any satisfactory evidence on the part of Defendants, and I find no reason to conclude that Complainant is not realizing all that is possible under existing market conditions from this or, in fact, any of its other residuals.

Candle Power:

It is provided by the Statutes and order of the Gas Commission here in question that the gas to be furnished by Complainant shall have an illuminating power of not less than 22 sperm candles, tested at a distance of not less than one mile from the distributing holder. A penalty of $1,000. is prescribed for each violation of this provision.

Proof was offered by Defendants indicating, as a result of tests made by the City, that the candle power maintained was in excess of the standard required by law, and it was argued that the cost of gas was, in consequence, unnecessarily increased. It is urged by Complainant that there is necessarily a fall in candle power
359 between the works and the testing station and a further fall between the testing station and various points in Complainant's system where gas is to be delivered; that it is incumbent on Complainant under the law to keep its candle power as such a point that in no instance nor at any place of test may its candle power be found below the legal standard, and accordingly it is essential that a margin should always be maintained above the required candle power. This contention is sustained by the proof which indicates that the average margin of candle power maintained is not in excess

of the requirements of prudent management, especially in view of the onerous penalties provided by the Statutes.

Cost of Gas to Other Companies:

Comparisons were made by Defendants' witnesses of the cost of gas to Complainant, with that to various other companies, chiefly those in New York City owned or controlled by Complainant. It is claimed that the statistics of these New York companies operating in the same field and purchasing their materials at the same prices as those paid by Complainant, clearly show the latter's operating cost to be excessive. An examination of the figures fails to sustain this contention, for it appears in each instance that, after correction of errors and making due adjustment for peculiar conditions existing in individual cases, the discrepancies in manufacturing cost are not great. It is practically agreed by the witnesses that no two companies even operating in the same city can reach precisely the same station cost and a difference of a few cents is not significant.

As to Central Union Gas Company.—Professor Bemis compared the station cost of coal gas to this Company for the year ending October 31, 1905, which he fixed at 13.49 cents, with the corresponding cost to the Complainant at its 14th and 42nd Street coal gas stations of 25.59 cents and 24.94 cents respectively. The proof shows that the Central Union plant had peculiar advantages as to coke, being able to deliver it, without storage or piling, to special
360 customers, thus eliminating all loss from breakage. It was, furthermore, possible to procure a substantially higher rate than can be realized in the Borough of Manhattan. The witness in his computation ignored the fact that the Central Union Gas Company during eight months of the year in question had no inspection for candle power and was consequently not maintaining as high a candle power as was required of Complainant and other companies in the Borough of Manhattan which were subject to inspection. The Central Union Company also enjoys certain advantages diminishing its cost of cartage and labor handling. Making due allowance for these items, the difference in cost between the two stations is found to be trifling. This result is confirmed by the fact that, although before July 1st, 1905, when the 22-candle power law went into effect, the Central Union delivered its gas under the agency agreement for less than 30 cents, the cost of its gas to the Complainant under the same agreement immediately after that date rose to substantially the same figures as the gas delivered by all other companies.

New Amsterdam Gas Company.—Mr. Edgerton made a comparison between the station cost of the New Amsterdam Gas Company, 29.01, and the station cost of the Complainant's water gas 31.05 cents. In so doing he took the nominal year 1905 for the New Amsterdam Company as against the calendar year for the Complainant, there being, however, in the latter two months during which 22-candle power gas was required. A comparison of corresponding periods reduces this difference to 1.61 cents, which is practically all accounted for by difference in cartage, as to which the New Amsterdam Company has special advantages, the item of station cost, which is less because of the New Amsterdam Company having but

one station as against several used by Complainant, and other similar items.

Like comparisons were made with the statistics of the Standard and Mutual Companies, with practically similar results.

361 *New Bedford.*—Mr. Edgerton, in support of his opinion that gas should be manufactured in the City of New York at 24 cents per thousand feet in the holder, gave as an instance the City of New Bedford where, he said, the cost was approximately that amount. Aside from the fact that the legal candle power in Massachusetts was shown to be 16 candles as against 22 in this State, it appeared that, through a clerical or typographical error in a published Massachusetts report, the distribution expense had been misplaced in the column intended for station cost, and that the report elsewhere showed the station cost to be 38.65 cents. Making adjustment for difference in candle power, the New Bedford cost would be in the neighborhood of 68 cents.

Chicago.—The report of the Chicago Commission already referred to fixed the cost of gas in that city at 55 cents. It appears, however, without dispute, that coal is materially cheaper and residuals are higher in all the Lake cities than in New York City, also from the report of the accountants who examined the Chicago plant, that no allowance was made in their examination for depreciation of plant in excess of that covered by current renewals.

As to the Reasonableness of the Return Allowed by the Eighty Cent Rate.

The complainant urges that it is a well located and well managed company and as such is fairly entitled to earn 10% on the value of its investment; that it must be permitted a maximum earning power to that extent in good years if it is to pay an average dividend of 8%; and that it is not customary nor is it "just" or "reasonable" to limit an industrial corporation, created by private capital, to the same maximum rate of return which the law permits to be charged for money loaned upon absolute security and at no risk of the business. It is pointed out that a return of not exceeding 10 per cent. with an additional reserve fund of 10 per cent., was recom-

362 mended for the Company by the Senate Committee of 1886; that the New York Mutual Gas Light Company by its charter is permitted to earn dividends to the extent of 10 per cent., sharing with its customers any earnings beyond that point; that the Senate Committee of 1905 assumed a return of 8 per cent., and the Gas Commission in 1906 found that 8 per cent. was a reasonable return upon the actual value of Complainant's property used in gas manufacture; that in England, where the return expected upon capital is substantially lower than in this country, gas companies pay dividends ranging from 8 to 10 per cent., and the three Metropolitan Companies of London pay an average of 8.24 per cent. on their capital, and that the Railroad Law of the State of New York provides (§ 38) that the Legislature may, from time to time, alter or reduce the "rate of freight, fare or other profits upon such roads;"

but that the same shall not, without the consent of the Corporation, be so reduced as to produce with such profits "less than 10% per annum on the capital actually expended."

The proof shows Complainants' dividends since its organization to have been as follows, being an average of a fraction over 6%:

Year.	Rate.
1885	7%
1886	3%
1887	4%
1888	4%
1889	5%
1890	5%
1891	5%
1892	6%
1893	7½%
1894	8%
1895	8%
1896	8%
1897	8%
1898	8%
563 1899	5½%
1900	6%
1901	8%
1902	8%
1903	8%
1904	8½%
1905	8½%
1906 Six months to June 30	3%

Several witnesses were called by complainants on this subject. Dr. Humphreys, who is largely interested in gas properties and has had wide experience in their appraisal and purchase, testified that 10 per cent. is a fair return to the original investors up to the time the business is fairly well established, "and the final average must be "made up on the basis at what the new capital can be bought in at, "in view of the natural hazards." Mr. Emerson McMillan, who is also largely interested in gas companies, testified that a gas business to induce purchasers should show a return ranging at the start from 9 to 15 per cent. Messrs. N. W. Halsey, Samuel B. Bertron and Allen B. Forbes, bankers, having large experience with gas properties and their securities, testified generally to the same effect. It was pointed out that the question of the rate of dividends actually paid by the Company was not to be considered so much as its earnings, one witness stating that he did not mean, in speaking of a return of 10 per cent., that dividends at that rate should necessarily be paid, for "no company can pay all it earns and be safely managed."

However well founded may be the opinions of these witnesses, it is evident that their point of view is not one that can be properly adopted in the present case. As a rule they testified from the standpoint of purchasers of gas properties, and Messrs. Humphreys and

McMillan, in particular, from that of men concerned with the original establishment and development of the enterprises. Naturally capitalists would find slight inducement to undertake the or-
364 ganization and development of an industrial business, with its attendant risk and labor, if its returns were limited to the ordinary interest rate, with the possibility of even less. Here a different aspect is presented. The question is whether Complainant, a fully organized and going concern, will be deprived of any portion of its existing assets because debarred from receiving from its customers such price as will afford a return thereon. Under the decisions of the Courts, considerations that might have weight from the standpoint of the purchaser or organizer of a business would have no force as between an existing company and its customers and *vice versa.*

For example, the original cost and present value of the assets are important factors to be considered here, but they were of secondary importance from the standpoint of the witnesses. Mr. McMillan said:

"I should not pay any attention to the original cost in figuring up its value. I should figure on what it would do, or what I would think it would do, under our management."

Mr. Bertron said, in regard to purchasing gas properties:

"We never consider such a proposition unless it is earning as much as 8 per cent., and we expect to get more than that out of it. If we should buy one on that basis it would be because we knew we could very largely increase our income by our development of the Company. * * * *We do not consider so much what the assets of that particular property are worth when we buy it.* We take into consideration of course the amount of money necessary to put the property into the shape we want it, and then, above all else, the franchise situation and whether or not the consumption can be largely increased."

The Defendants urge that the reasonableness of a return upon any given investment depends upon its security; that the security of the Complainants' investment is practically guaranteed by the
365 public demand and necessity for gas and the Company's virtual monopoly of the supply; and that if, in addition, Complainant is allowed depreciation as an operating charge, thereby preserving its Capital intact, the rate of return allowed upon the investment "should be as low as the nature of the investment as affected by such an allowance warrants," or, as counsel state it, that an earning of 5% per annum "would be a fair return, that an earning of 6% per annum would be a liberal return, and that an earning of 4% per annum would not be a confiscatory return."

The evidence offered in support of this contention consisted chiefly of figures showing the returns upon the stocks of various gas companies elsewhere. Mr. Marvyn Scudder, a compiler of statistics on financial subjects, presented the following as of December 31, 1905:

Company.	Price of stock.	Dividends.	Net to investors.
People's Gas Light Co. (Chicago)	100¾	6%	5.98%
United Gas Improvement Co. (Philadelphia)	188½	8	4.38
Consumers Gas Co. (Toronto)	207	10	4.85
Detroit City Gas Co. (Detroit)	200 (asked)	5	2.50
Laclede Gas Co. (St. Louis)	105	5	4.76
Lowell Gas Co. (Lowell)	245	10	4.08
Consolidated Gas Company	181	8	4.42

366 Professor Bemis presented the following:

Gas Stocks and Dividends.

January 1–September 1, 1906.

Company.	Annual dividends. Per cent.	Price of stocks.	Net return on investment. Per cent.
Cambridge, Mass.	10	275	3.64
Charleston, Mass.	10	252	4.
Lowell, Mass.	10	248	4.
Lynn, Mass.	10	325	3.08
Mass. Gas Companies, Com.	...	57¾	
Mass. Gas Companies, Pref.	4	88½	4.52
Montreal Light, Heat & Power Company.	4	96	4.17
United Gas Improvement Co., Philadelphia.	8	172¾	4.65
Consolidated Gas, Baltimore, Common.	...	37½	
Washington, D. C.	10	300	3⅓
People's G. L. & C. Co., Chi.	6	99 to 114	5.27 to 6.
Laclede G. L. Co., St. Louis, Common.	5	95	5.26
Laclede G. L. Co., St. Louis, Preferred.	5	95	5.26

Statistics were also offered as to the dividend rates and market prices of Complainant's stock but, as already pointed out, these are of little significance, as it is not possible to say to what extent the market quotations of recent years were affected by its ownership of electric lighting securities.

Nor are the market ratings of other gas stocks of much assistance.

367 The market price of a stock is well known to be dependent on numerous elements other than its rate of dividends, as, for example, its earning power, the amount of its surplus, its outstanding capital, and the general business conditions prevailing throughout the country. In the absence of full information on these matters, the figures above quoted are without significance. For example, in the case of the Laclede Gas Company of St. Louis, paying a dividend of 5 per cent. and netting to the investor 5.26, it appears that the Company is capitalized on a basis of $8.23 per thousand feet of production or an equivalent of 8.23 per cent. on a capitalization

of $5 per thousand feet. Applying this capitalization to Complainant's sales would give a capital of about $108,000,000, 5 per cent. on which would be much in excess of Complainant's present earnings.

As already pointed out, the Courts have established no definite rule by which the reasonableness of the rate of return may be determined. As was said in *Covington &c. Turnpike Company v. Sanford*, 164 U. S. 578, 597:

"Each case must depend upon its special facts; and when a court without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority and practically deprived the owner of property without due process of law."

The Court also said in that case:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly in-
368 adequate for keeping the road in proper repair and for earnin- dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent. on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon the capital stock."

In *Stanislaus Co. vs. San Joaquin and Kings River Canal Co.*, before cited, it was held, that it was not confiscation to fix water rates so as to give an income of 6 per cent. upon the then value of the property actually used, even though the Company had prior thereto been allowed to fix rates that would secure to it 1½ per cent. a month income upon the capital actually invested. On the other hand it was held in *Milwaukee &c. Co. vs. Milwaukee*, 87 Fed. Rep., 577, 585, that an ordinance permitting a gas company to earn 4.5 per cent. on the cost of reproduction of its tangible property was unconstitutional, and in *Spring Valley Water Works vs. City and County of San Francisco*, 124 Fed. Rep., 574, that 4.40 per cent. on the value of the property or 3.30 per cent. on the capital stock of the corporation was unreasonably low and confiscatory.

The legal rate of interest has sometimes been taken into consideration. Thus in *Louisville &c. Railway Co. vs. Brown*, 132 Fed. Rep., 946, 951, it was held, that a railroad is entitled to earn at least a legal rate of interest upon the actual value of its property. The legal rate was also considered in *Spring Valley Water Works vs. City and County of San Francisco*, above cited, though the Court in that case fixed as a proper return 5 per cent. In the *Columbus Railway & Light Company Case*, before cited, the Special Master expressed the view that the owner of the property should at least be permitted to receive as his compensation for its use the legal amount of interest

allowed by the State of Ohio to be collected, in the absence
369 of contract, for money loaned, goods supplied or services rendered, saying that:

"Without at least this legal compensation the owner is deprived of the use of his property and of his property without due process of law, and is denied the equal protection of the laws,"

citing *Noyes on Railroad Rates*, 209. See, also, *Chicago Union Traction Co. vs. State Board of Equalizers*, 114 Fed. Rep., 557, 561.

In the present case the property on which Complainant is entitled to a return, as hereinbefore found, amounts to $83,357,000, made up as follows:

I. Real estate (less deductions)	$13,461,000
II. Plants	15,500,000
III. Mains	12,636,000
IV. Services	1,994,000
V. Meters and miscellaneous	4,100,000
VI. Working capital	3,616,000
VII. Coal & Coke Co.	50,000
VIII. Astoria, *i. e.*, capital invested in production of gas secured from other companies	12,000,000
	63,357,000
	*47,
	*16,357,000
IX. X. Franchises and good will	20,000,000
	$83,357,000

[In pencil on margin:]

	$47,000,000	
	2,141,155	
	160,000	
R. E.	2,301,155	..
W. C.	2,000,000	
As.	12,000,000	
	16,301,155	
N. C. & C.	50,000	
	$16,351,155	

The net earnings for the year 1905, adjusted in accordance with the views already expressed, were $4,983,928.31 arrived at as follows:

Note.—Deductions (See pp. 23, 24, *ante*) $40,000, Block 688.
30,000, Shadyside.

* In pencil in copy.

370	Gas Sales			$13,552,482.97
	Miscellaneous Income			172,710.53
National Coke & Coal dividend				5,000.00
	Total			13,730,193.50
Operating Expenses (as per Exhibit 94)			$9,936,910.42	
Less: Fixed charges		$972,423.44		
	Int. on Consumers' Deposits	51,391.52		
	Taxes not applicable to gas business:			
	On Earnings	$5,257.48		
	On Dividends	57,965.39		
		63,222.87		
	Premium p'd for gas manuf'd under agency agreements 13,283,000,000 cu. ft. @ 0.78c.	103,607.40		
			1,190,645.23	
				8,746,265.19
Net Earnings				$4,983,928.31

Of the 13,283,163,767 cubic feet of gas, sold and delivered in 1905 by Complainant, 398,525,978 cubic feet were delivered and charged to the City of New York at 90 cents per thousand cubic feet and 12,884,637,789 cubic feet to private consumers at $1.00 per thousand cubic feet; and

For present purposes it may be assumed, ignoring the special rate fixed for gas supplied to the City, that all the sales for 1905 were at the rate of $1.00, and that the 80 cent rate will similarly apply to all sales.

Deducting 20c. per thousand feet of sales from the net earnings of 1905 the result is as follows:

Net earnings as above	$4,983,028.31
Less 20c. per thousand on 13,283,000,000 feet of sales	2,656,600.00
	$2,327,328.31

371 This amount would yield on Complainant's entire assets of $83,357,000 a return of 2.8% and on its assets exclusive of franchises and goodwill 3.6% neither of which in my judgment constitutes a fair or reasonable return on the value of the property.

Assuming, on the basis of the decisions above quoted, that Complainant is entitled to receive at least the legal rate of interest as a return upon its investment, the above net earnings would yield 6% upon its assets to the extent only of $38,788,805, leaving assets amounting to $24,569,000 (exclusive of franchises and good will) on which it would receive no return whatever.

Pressure.

The Statutes here in question require that

"the pressure of illuminating gas in any service mains in said city at any distance from the place of manufacture shall not be less than an inch, nor more than 2½ inches."

It seems reasonably clear that by the expression "service mains"

is meant the ordinary distribution mains of Complainant to which its service pipes are attached. It is averred in the bill of complaint, that

"It is an absolute physical impossibility for your orator to comply with the provisions in regard to pressure. The pressure must of necessity vary beyond the limits prescribed thereby in the mains of your orator owing to differences of elevation in the city mains and the consequent difference of atmospheric pressure and, owing to the laws of nature, these differences of pressure cannot be obviated by your orator."

The limitation as to minimum pressure is not criticised, but it is pointed out that the proof shows no other city where a maximum pressure for gas has been established, and that modern appliances, such, for example, as Welsbach burners, gas logs and ranges,
372 require a much higher pressure for service to consumers than was the case some years ago.

As was explained by Mr. Bradley, Complainant's Chief Engineer, owing to variations of pressure caused by differences in elevation and by atmospheric and barometric conditions in connection with the varying consumption of gas by consumers, it is necessary at times to exceed a maximum pressure of 2½ inches at certain points, else there would be a great many other points on the mains where there would be practically no pressure whatever. At the latter points the lights would be extinguished and later, when by reason of diminishing pressure the supply was resumed, the gas would escape through the open burners with dangerous results. The witness testified that during the previous year he had installed automatic signal apparatus, connecting with pressure stations, to guide the regulation of the pressure at the distributing points, so far as possible, but that he had found it impossible to regulate the pressure within the limit of the law. While the pressure can be maintained at various points as required, it cannot be maintained, as Complainant claims, at every point and at every time within the limits prescribed by the statute. It appears that some of Complainant's mains are at an elevation of 250 feet above tide level, and that a difference in altitude results in a difference in pressure, owing to the levity of the gas, of one-tenth of an inch in every 17 feet, so that between tide level and the highest mains there would be a total difference in pressure of about an inch and a half with gas having a specific gravity of that made by Complainant.

Under the conditions now existing, Complainant's contention appears to be well founded. Mr. Marks, on behalf of the City, admits that at a height of 100 feet above sea level it is necessary to accept a minimum pressure of 1½, and a maximum pressure of 3 inches, and at a height of 200 feet a minimum pressure of 2 inches and a maximum of 3½ inches. He testified, however, that he could comply with the law if allowed to expend whatever sum he deemed
373 necessary for the purpose, which would involve, after a topographical survey showing differences in level, a segregation of mains according to those levels throughout the city, after which it would

"then be necessary to see that in some method the pressure which comes from the holder usually should be so regulated or modified for each level that it would never go above 2½ inches or below 1 inch, and this is physically possible."

It would, however, be likely to require the substitution of larger mains than those now in use.

Mr. Edgerton testified that he thought the pressure required by statute could be maintained "under due precautions," by the introduction of changes in the Company's system of distribution and without great expense. He suggested that gas could be delivered in the mains at a more uniform pressure than at present by the construction of high pressure mains, running on either side of the city parallel with the shores of the island, the pressure of the gas being regulated by governors or valves. Aside from any question as to the feasibility of this system, as to which some doubt is suggested by the evidence, it appeared that the cost of the new construction necessary to carry out the plan as described would be in the neighborhood of $4,000,000.

Mr. Bradley admitted that it was practicable to divide the city into districts, as suggested by Mr. Marks, and place district regulators or governors at different points; also that such governors were used in many cities; that theoretically it was practicable to use them here, but added that practically there were serious objections, the chief of which appeared to be his doubts of the reliability of automatic machinery. He said it would cause

"the consumers in a great city like New York to depend upon the automatic action of an automatic governor buried somewhere
374 in the street, or an automatic governor situated in the basement or on the first floor of a building. If the city was districted off in that way and each district supplied through a governor, it would be a matter of very grave doubt whether at times this governor would not fail to operate, like all automatic machinery, and with an important, and I might state dangerous element, as gas is, it is not wise to introduce any element that adds to the danger. And in my opinion district governors do add to the dangers of interruption and difficulty with gas supply."

Various charts were presented by the witnesses illustrative of existing conditions as to pressure at different points. They do not, however, affect the general conclusion to be drawn from the testimony as a whole, which may be summarized as follows:

Under the distributing system as now existing and in operation, it is not possible to fulfill the statutory requirements as to pressure. It would, however, apparently be possible to remedy this condition, at least to some degree, by dividing the city into different districts, according to the varying levels and by regulating the pressure in each by district governors. The efficacy and safety of such governors is not free from doubt and the evidence affords no sufficient basis for an estimate of the cost of their installation or the expense of making the necessary changes in the system of mains.

Conclusion.

Counsel for the Complainant and for the State authorities have submitted requests for special findings as to sundry matters of fact. Practically all the questions covered thereby, so far as considered material, have been specifically passed upon in the foregoing pages, and for this reason it is deemed unnecessary to recapitulate said requests or make separate rulings thereon.

All of which is respectfully submitted.

Dated, New York, May 18, 1907.

375 *Notice of Completion of Draft Report.*

CONSOLIDATED GAS CO.
v.
MAYER ET AL.

To Shearman & Sterling, Esqs., solicitors for complainant; Robert C. Taylor, Esq., solicitor for defendant Wm. Travers Jerome, as district attorney, &c.; Hon. William S. Jackson, Attorney General, solicitor for defendants Julius M. Mayer, as Attorney General, &c., and Frederick E. Gunnison *et al.*, constituting the State Commission of Gas and Electricity; Hon. William B. Ellison, solicitor for defendant, the City of New York.

GENTLEMEN: Please take notice that I have completed my draft report in this cause, a copy of which is herewith served on each of you, and that counsel will be heard at my office on Tuesday, the 28th day of May, 1907, at 11 o'clock A. M., with regard to any suggested corrections therein or amendments or additions thereto. Such suggested corrections, amendments or additions should be reduced to writing, and a copy thereof served on the solicitors for the various parties to the cause, and filed in my office on or before Saturday, the 25th day of May.

In view of delays in the preparation of the draft report occasioned by the omission of citations from the record in certain of the briefs submitted, it is particularly requested that in all cases where the record is relied upon in support of any suggested changes the fullest reference should be made to the appropriate pages of the testimony or exhibits.

You are further notified that unless modified in consequence of suggested corrections amendments or additions served and filed as aforesaid, the said draft report will be signed and filed as my final report herein.

Yours &c.,

ARTHUR H. MASTEN,
Master in Chancery, U. S. Circuit Court,
Southern District of New York.

Dated New York, May 18, 1907.

376 On the 20th day of May, 1907, copies of the foregoing draft report and notice were delivered to counsel for the several parties, who thereafter, on the 25th day of May and various subsequent days to which the proceedings were on request adjourned, appeared before me and were heard regarding suggested changes and amendments in said draft report. Various typographical and other errors not of substance were noted which have been corrected before printing the foregoing pages. In addition thereto counsel presented certain written suggestions for amendment, and various objections, which so far as deemed material are hereinafter set forth with notations of the disposition made thereof:

Complainant's Amendments.

The complainant presented the following:

"The Complainant presents requests for the following amendments or additional findings in the Master's Report, in words or substance:

(As a possible convenience, a point in the report is indicated where such new matter might in each instance be appropriately read in or considered as inserted.)

I. Page 42, to correct a clerical error and conform the paragraph to the testimony, in line 5, after the word "plant" insert:

"and other tangible property."

And in line 7, in place of the word "less" insert:

"if any, greater in the aggregate."

And in line 8, in place of "Complainant" insert:

"constituent companies."

Allowed. As thus corrected the last sentence in sub-division IV (page 42) will read as follows:

"As regards mains and services, therefore, as well as real estate, plant and other tangible property, it does not appear that any sufficient ground exists for the suggestion that the appraised value of 1884 was materially, if at all, in excess of the aggregate cost of the tangible property to the constituent companies."

377 II. Page 45, line 26, after the word "construction" insert:

"Mr. Bradley's particular reference was to the cost of coal gas in Manhattan (about 9,500,000 cubic feet of maximum daily capacity out of a total capacity in Complainant's Manhattan plants of 51,000,000 cubic feet) as compared with expected cost of coal gas at Astoria; and he added in substance that he did not think he would be able to produce such gas at Astoria at any lower figure than the cost of water gas at the Consolidated stations in Manhattan."

Allowed, and I so find.

III. Page 49, line 8th from bottom, after "Bronx" insert "except the Bronx Gas and Electric Company."

Allowed, and I so find.

IV. Page 81, 3rd line from bottom, after the figures "$4,588,000" read in: "from gas sales, only according to its claim, which is less than I find its net earnings to be from its entire gas business."

Allowed, and the sentence in question amended so as to read as follows:

"Complainant's net earnings for the year 1905 were, in round figures, $4,588,000. from gas sales only, according to its claim, and this amount is less than its net earnings from its entire gas business."

V. Page 91, between lines 3 and 4 from bottom of the page insert:

"While, as I have indicated, I do not find it practicable to differentiate with exactness the relative value of Complainant's franchises and good-will, there is no doubt that the franchises of Complainant relating to public highways are of themselves worth not less than $....." (amount to be inserted by Master).

Disallowed.

VI. Page 109, line 17, after the words "necessity of," insert:

378 "an allowance sufficient to bring the amount chargeable for current repairs and renewals for the year 1905 up to the average of the company's past experience, and also of."

And in consequence on line 19, after "terms," insert the words: "final renewals" and "contingencies."

Allowed, and the sentence in question amended so as to read as follows:

"Complainant's claim is based on the necessity of an allowance sufficient to bring the amount chargeable for current repairs and renewals for the year 1905 up to the average of the Company's past experience and also of a sufficient reserve fund to cover "final renewals" and "contingencies." The terms "final renewals" and "contingencies" have been used more or less indiscriminately by the witnesses."

VII. Page 112, 13th line from bottom, after the words "as to," insert:

"an allowance sufficient to bring the amount for current repairs and renewals for any year up to the company's average experience, and as to."

Disallowed, so far as concerns the insertion of the proposed amendment on the page indicated. It is, however, the fact that the propriety of an allowance sufficient to bring the amount expended for current repairs and renewals for any one year up to the average covering a period of years, is fully established by the evidence. I have so found on page 114.

VIII. Page 126, following line 2, insert:

"In said 65.84c there is included no allowance to bring charges for current repairs and renewals for 1905 up to the company's average for the preceding twenty years (3.55c), or for final renewals (computed by Dr. Humphreys to require 3.26c additional) or for any reserve fund (for which Professor Bemis allowed to Complainant 3c before the Gas Commission and which Dr. Humphreys

379 estimated at 5c), or for additional cost of enrichment, increase in taxes and increase in labor which has been actually experienced as hereinbefore mentioned (4.36c),—said items together aggregating over 14c per thousand feet of gas sold,—or for renewals or depreciation on the plants and property employed outside Complainant's Manhattan works in production of gas sold but not made by Complainant except so far as said items may be covered by the

7.88c remaining after deducting from the contingent fund of 10c above discussed, the current replacements of 2.12c included therein."

Allowed, and I so find.

IX. Page 131, line 18, after the word "that" insert:

"oil is cheaper in Chicago than New York, and that."

Allowed, and I so find.

X. Page 140, after the line reading "Net earnings * * * $4,983,928.31" insert:

"The above expenses, $8,746,265.19, represent the 65.84c. per thousand feet of gas sold in 1905 as above found; and accordingly include no allowance to bring current repairs and renewals up to the average of the company's previous experience, or for final renewals or reserve fund, or for actual increase in cost of enrichment or taxes or labor, or for renewals and depreciation on property employed outside Complainant's plants in production of gas sold by it, except to the extent hereinbefore stated."

Allowed, and I so find.

XI. Page 141, following line 12, insert:

"Although in my view, as above expressed, of the basis of valuation upon which the Complainant is entitled to a return, no additional findings on that subject are necessary, for the further information of the Court I find upon the evidence that the actual cost to Complainant of the tangible property and franchises employed in its gas business (including the amount found by me to be the capital invested in production of gas for Complainant outside Complainant's Manhattan works) is at least $60,214,000 made up as follows:

I. Real Estate, at least	$9,322,000
II. Plants (Manhattan) at least	14,579,000
III. Mains, at least	7,852,000
IV. Services, at least	1,212,000
V. Meters and Miscellaneous, at least	3,802,000
VI. Working capital, at least	3,616,000
VII. Coal and Coke Co.	50,000
VIII. Astoria Unit (*i. e.* capital invested in production of gas sold by Complainant, made outside Complainant's Manhattan Works)	12,000,000
IX. Franchises and rights	7,781,000
Total	$60,214,000

If franchises and good will included together at the aggregate value of $20,000,000 above found by me, in lieu of the item of "Franchises and rights," the actual cost to Complainant of its tangible property plus the value of its franchises and good will is at least $72,433,000.

Allowed and I so find.

XII. Following the last preceding proposed finding insert:

"There is no satisfactory evidence that the cost to Complainant of said property was unreasonable or excessive; or that the cost of production of said property was enhanced through faulty construction or waste; or that the various sums expended from time to time by

Complainant or its predecessor companies in permanent improvements and betterments were not intelligently and properly expended or that any such expenditure was made otherwise than providently and honestly.

"Nor is there any satisfactory evidence that any of the expenditures of Complainant for material, labor or otherwise, in the manufacture and distribution of gas have been improper, unnecessary or unreasonable."

Allowed and I so find.

XIII. Following the last preceding proposed finding insert:

"I also find, upon all the evidence and *criteria* before me, that in view of the character of Complainant's business and other
381 features which are to be taken into consideration, a just and reasonable rate of return upon the value of the investment in Complainant's gas business is not less than the legal rate of six per cent. per annum; *and that without at least this compensation, Complainant would be deprived of the use of its property and of its property, or some portion thereof, without just compensation.*"

All counsel in their briefs have treated the question as to what was a just and reasonable rate of return upon Complainant's invested capital as one that could properly be passed upon by me under the order of reference herein. As to whether this is the case does not seem altogether clear under the authorities. Upon the hearing of objections to the draft report, however, counsel both for the State officials and the City of New York objected to the making of any finding upon reasonableness of return as a question of fact. Counsel for Complainant urged that such a finding should in any event appear in the report for the information of the Court, in case it should be held herein that the question is one of fact and not of law. Accordingly, assuming the question to be one of fact, the above proposed finding is allowed, excepting as to the last sentence (in italics) which need not be passed upon, being a conclusion of law.

Such a finding is abundantly supported by the evidence, including that of Defendants' witnesses. In addition to the facts noted *ante*, pages 131, 132, the record shows that Professor Bemis in his calculations has assumed 6% as the proper rate of return in this and several other cases, while Dr. Marks expressed the view that a dividend rate of 8% was fair.

XIV. Page 143, 14th line from bottom, after figures "$4,000,000":

"for main and valve construction alone, in addition to which would be required pumping stations and apparatus, the annual charges and operating expenses in connection with which Mr. Ad-
382 dicks testified would amount to several cents per thousand feet of gas sold, and which would involve a corresponding increase in operating cost or proper selling price of such gas."

Allowed, and I so find.

XV. Also before the heading "Conclusions" on page 144 insert:

"I find that the Complainant has about 390,000 customers in the City of New York to whom bills are sent monthly, that the penalty imposed by Chapter 125 of the Laws of 1906 is $1,000 for each charge for gas in excess of eighty cents per thousand feet, to customers other than the City of New York, and that the penalties accru-

ing against Complainant if it charged more than eighty cents would amount in the aggregate to about $390,000,000 per month, and over $4,680,000,000 per year, or fifty times as much as the value of the entire assets employed in Complainant's gas business as found by me.

"I also find that by Chapter 737 of the Laws of 1905 it is provided that where a price in excess of the statutory rate is demanded that fact shall constitute a complete defense to an action for a recovery for the amount of gas delivered, and that no recovery shall be had therein.

I also find that the penalty of $1,000 for each offense violating Chapter 736 of the Laws of 1905 and Chapter 125 of the Laws of 1906, which provide that the pressure of illuminating gas in any service main in the City of New York at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches, would aggregate $5,000 per diem upon evidence recorded at each of the five city testing stations, of only a single violation per diem of said laws, or at the rate of $1,800,000 per year under Complainant's distributing system as now existing and in operation, which amounts are liable to be increased by additional or more frequent tests.

I also find that said penalties so far as the evidence shows are unexampled in extent and severity, *and that under and by reason of the same there is denied to Complainant the equal protection of the laws.*"

Allowed except as to the conclusion of law (in italics), and I so find.

383 *State's Objections and Amendments.*

Counsel for the State authorities presented the following:

"The defendants, Attorney-General, Commissioners of Gas and Electricity, and District Attorney, do hereby make the following objections to the draft report of Arthur H. Masten, herein, dated May 18th, 1907.

First. To the finding at page 5 of the draft report that the amount of the capital and assets of complainant as of June, 1884, exclusive of working capital, in the shape of cash, accounts receivable and current supplies was $37,775,000. But on the contrary thereof request the Master to find that the cost to the constituent companies, of its several classes of property without appreciation or depreciation, was, as shown by the books of the constituent companies, $20,942.632.85 (see City Exhibit 48, page 1398), and that the item of $7,781,000 did not represent anything of value but was an arbitrary figure, used for the purpose of equalizing stock values, as shown by their market price, between the constituent companies (Complainant's Exhibit 227, pages 921 and 922).

Objection overruled and proposed finding disallowed. The evidence clearly shows that the actual cost, to them, of the property of the constituent companies was in excess of the $20,942,632.85 shown on their books (see *ante,* page 41). As to the item of $7,781,000

representing the franchises, there is no evidence whatever that it did not represent actual value, and such evidence as the record discloses on the subject is to the contrary effect.

Second. To the findings on pages 13 to 15 of the draft report, that the present value of the complainant's real estate (exclusive of that part of the 18th Street station condemned by the City) is the sum of $14,161,000., and to each specific allotment of the valuation thereof.

Overruled.

Third. To the finding of the Master at pages 16 to 23 of
384 the draft report, that lands leased, vacant, unimproved or not owned by the complainant should not be excluded from the valuation of property upon which the complainant is entitled to receive a return from the income derived from its gas business.

Overruled. The objection as drawn is too broad. There is no general finding to the effect above stated.

Fourth. To the Master's refusal to exclude from the valuation of the real estate upon which complainant is entitled to receive a return from its gas business, the land covered by the abandoned and partially dismantled manufacturing plants at 18th Street and 11th Street stations.

Overruled. The land occupied by the unused portion of the manufacturing plant at 18th Street (valued at $400,000.) was excluded by me from the valuation of the real estate upon which Complainant is entitled to a return. (*Ante*, page 23.) At 111th Street station there are located two large holders of 5,000,000 cubic feet capacity. The property is in use or available for use, and, upon the evidence, it cannot be regarded as abandoned.

Fifth. To the Master's finding at page 26 of the draft report, that the original cost of the real estate of the complainant is represented by the issue of stock, to the extent of $10,332,000 to the constituent companies and not the cost to the constituent companies, as shown by their books.

Overruled.

Sixth. To the Master's finding at pages 27 and 28 of the draft report that the complainant should be allowed the benefit of appreciation in the value of real estate over and above its cost, inasmuch as he declined to allow for depreciation in the value of the plant.

Overruled. Depreciation of plant was allowed (*ante*, p. 35).

Seventh. To the Master's finding the value of the plant by
385 estimating the value of the land as vacant property, and the buildings thereon separately and adding them together, instead of taking the value of the propetry as improved.

Overruled. This objection is inaccurately stated. All parties, including the State, submitted separate estimates for the value of the land and of the buildings, apparatus, etc., constituting "plant," as defined *ante*, page 28. Buildings other than those constituting part of "plant" were valued by me in connection with the land (*Ante*, page 13).

Eighth. To the Master's finding at pages 31 and 32 of the draft report, that the correct method of estimating the value of complainant's buildings was to obtain a unit of value based on cubical

contents of the buildings of the Kings County Gas and Illuminating Company and from such unit figures, computing the values of complainant's buildings by the method of comparative cubical contents.

Over-ruled. There was no finding in the broad terms above stated.

Ninth. To the Master's finding at page 31 of the draft report that the buildings of the Kings County Gas and Illuminating Company were similar to the buildings of the complainant.

Over-ruled. The testimony to that effect was uncontradicted.

Tenth. To the finding on pages 36 and 37 of the draft report, that the value of the complainant's plant to be substantially in accordance with the estimate of Mr. Mayer, the summary of which is given upon page 37 and fixing the value thereof at $15,500,000 and to each specification of value on page 37, on the ground that the theory upon which the estimate was made was wrong, in that the present cost of reproduction, irrespective of the fact as to whether the particular apparatus was commercially and economically worth reproducing, and does not show the cost of reproducing a modern plant to-day that would accomplish the same results, and upon the further ground that there is contained therein apparatus that had been abandoned and is not now in use by the complainant in its gas-making business, and upon the further ground that the valuations thereof are excessive.

386 Overruled. Counsel fail to point out, as requested, any evidence in the record in support of the statement that the Mayer estimate included apparatus abandoned or not now in use.

Eleventh. To the valuation given on page 37 of the draft report to the 18th Street plant, to the 111th Street Holder Station and the Inwood Holder Station, on the ground that there is contained therein in excess of Mr. Mayer's valuation for the holders at 18th Street, $453,695., the value of the dismantled and abandoned manufacturing plant, both at 18th and 111th Streets, and that the Inwood Station is not used by the company.

Overruled. See *ante*, Objections Fourth and Tenth.

Twelfth. To the finding of the value of the manufacturing plant of the complainant to be $15,500,000., on the ground that the complainant has failed to give any correct and true value of the plant used by it, and that the Master should have found a failure of proof on the part of the complainant in this behalf.

Overruled.

Thirteenth. To the finding on page 38 of the draft report, that the evidence shows, that on October 31st, 1905, complainant's mains of various sizes amounted in the aggregate to 822 miles, exclusive of 70 or 80 miles of abandoned mains, on the ground that the evidence shows that complainant has 795.47 miles of active mains (Page 2031 of the testimony).

Overruled. While the evidence shows that the mileage of active mains amounted to but 795.47, the mains actually in the ground and carried on the books aggregate 822.2 miles. The difference, amounting to 26.7, represents mains that have not been abandoned but are available for active use at any time.

Fourteenth. To the finding on page 39 of the draft report, that

the present value of the mains to be $12,636,000, on the ground
that the same were carried upon the books of the company
387 at the value of $7,852,151.03, as the actual cost thereof,
and that the allowance of $4,783,849, for an estimated increase in cost of laying the same to-day because of the change of pavements over that which it has actually cost the company is not the proper allowance representing no outlay of cash on the part of the company and representing the value of no property devoted by it to the public use.

Overruled.

Fifteenth. To the finding contained on pages 42 to 44 of the draft report, that the complainant should be allowed a working capital of $3,616,000 as a part of its property devoted to the public use upon which it is entitled to earn a return, and specifically including therein accounts receivable outstanding as an item upon which the consumers of gas are required to pay a return.

Overruled.

Sixteenth. To the finding on pages 44-48 of the draft report, that the value of the plant of the Astoria Light, Heat & Power Company placed at $12,000,000 should be included in the property upon which the complaint is to be allowed a return.

Overruled. It was not intended to make any finding so broad as above stated. The cost of the first Astoria unit was used as a standard by which to determine the amount of capital employed in the production of the 3,000,000,000 cubic feet of gas purchased in 1905. (See *ante*, page 52.)

Seventeenth. To the finding on pages 49-52, that the complainant is entitled to earn a return upon the capital employed by other companies in the production of 3,000,000,000 cubic feet of gas purchased by the complainant in 1905, and that if the complainant was not to be allowed $12,000,000. on the value of the Astoria plant that it should be allowed the said sum of $12,000,000 as an equivalent investment to produce the 3,000,000,000 cubic feet of gas purchased by it.

Overruled.

388 Eighteenth. To the finding on pages 52-90, that the complainant's franchises and good will are of the reasonable value of $20,000,000., or that the same should be taken at any value whatever as property devoted to the public use upon which the complainant is entitled to a return.

Overruled.

Nineteenth. To the finding on page 101, that in ascertaining the cost of making gas in the year 1905, there should be included item 47, repairs to gas stoves, $55,954.35.

Overruled.

Twentieth. To the finding on page 102 of the draft report, that item 53, the amount expended by the company in caring for street-lamps, $289,259.09 should be included in the cost of gas.

Overruled.

Twenty-first. To the finding on page 103 of the draft report, that the sum of $25,671.74, representing disbursements in connection with legislative investigation, and the sum of $63,401.65 covering

expenses growing out of franchise tax litigation should be included in ascertaining the cost of gas.

Overruled.

Twenty-second. To the finding on page 104 of the draft report, that item 62, $42,674.71 rentals paid by complainant for premises leased by it, it not appearing that said premises are necessary for use in its business.

Overruled. These rentals cover various bulkheads, piers, etc., occupied and used by Complainant. There is evidence to the effect that they are necessary in the conduct of Complainant's business, and counsel have failed to indicate any evidence to the contrary appearing in the record.

Twenty-third. To the finding on page 104 of the draft re-
389 port, that complainant should be allowed the following items under item No. 66 as a proper charge against the cost of gas:

"taxes on income from other companies' securities...	$5,257.48
taxes on dividends in excess of 40% on $38,643,-590.14, stock invested in securities.....	57,965.39
taxes on $41,356,409.86 stock in gas companies" (excess dividend on capital stock employed in gas business State's Exhibit M., page 419).....	62,034.61
Interest on unpaid taxes.....	94,506.29
Total.....	$219,763.77

Overruled. The first two items were disallowed as a proper charge against the cost of gas. (*Ante*, page 123.)

Twenty-fourth. To the finding on pages 105-124 of the draft report, that the sum of $1,328,316.37, being 10 cents per thousand feet of gas sold in the year 1905 is a proper charge as a part of the cost of gas for contingent expenses including renewals.

Overruled.

Twenty-fifth. To the finding on pages 126 and 127 of the draft report, that the price for 34° oil at 4.875c. per gallon and for 28° at 4.29c. per gallon was a reasonable price.

Overruled.

Twenty-sixth. To the finding on page 128 of the draft report, that the price received by the complainant for its coke, $4.71 per ton is a sufficient and proper price.

Overruled.

Twenty-seventh. To the finding on pages 131-141 of the draft report, that the rate of 80 cents per thousand cubic feet for gas does not allow to the complainant a reasonable return.

Overruled.

Twenty-eighth. To the finding on page 141 of the draft report, that it is impossible for the complainant to comply with the
390 requirements of the statutes: "the pressure of illuminating gas in any service main in said City at any distance from the place of manufacture shall not be less than an inch nor more than 2½ inches."

Overruled.

Twenty-ninth. To the Master's refusal at page 144 to specifically pass upon the request for special findings on behalf of these defendants, and request that the same may be taken up and passed upon in the final report or that the same, with Master's ruling noted thereon, may be filed as a part of the final report.'

Overruled. The special findings requested are hereinafter passed upon.

"The said defendants hereby request the Master to find the further facts and embody them in his final report:

"I. That of the real estate of the constituent companies transferred to the complainant in 1884 the following parcels have either been sold or are not now used by the complainant in its gas business. That the said parcels were valued in the appraisal made at that time at the figuring set opposite each parcel respectively.

1. Deeded to Standard Gas Light Company (Ex. p. 233 & Ex. 48)		
8 lots Ave. A, 62nd to 63rd Sts. with corners		68,000
115 ft. on 63rd St. 4 3/5 lots at $6,000		27,600
115 ft. on 62nd St. 4 3/5 lots at $5,000		23,000
		118,600
2. Deeded to New Amsterdam Gas Company (Ex. 48 Ex. p. 200, 201) 10 lots 15th St. bet. Ave. C. & D. at 7,000	70,000	
10 lots 16th St. bet. Ave. C. & D. at 6, 000	60,000	
		130,000
3. 111th St. Station (Ex. p. 318)		604,000
4. bulkhead (Ex. p. 319)		100,000
5. 18th St. Station (Test. p. 203)		1,823,000
6. East 20th to 22nd Sts. bulkhead taken by the City		250,000
391 7. 60th to 61st Sts. Ave. A. wooden buildings rented (test. p. 30 Ex. 232)		158,500
8. Shadyside (test. p. 50 Ex. 235)		50,000
9 South side 15th St. bet. Ave. A. & B. well property		12,000
10. 65th St. & West End Ave. w. s. vacant, (test. p. 107; Ex. p. 234)		115,000
		$3,361,100

which, deducted from the appraisal value of the real estate, $10,332,000 would leave the amount of real estate taken over and now in use, of the appraised value in 1884 of $6,970,900. If the Master shall refuse to find that all of said parcels should be excluded, he find specifically as to each item from 1 to 10 above set forth.

Dissallowed, excepting that it is the fact and I so report, that (1) the several parcels numbered 1 to 10 inclusive were appraised in 1884 at the figures respectively indicated, amounting in the aggregate to $3,361,100; (2) parcels 1 and 2 have been sold; (3) a portion of parcel 3 representing, according to the appraisal of 1884, a

valuation of $84,000, has been taken in condemnation proceedings; (4) a portion of parcel 5 has been similarly taken, amounting, according to 1884 valuations, to $1,101,250, and (5) parcel 6 has been similarly taken. I decline to find that the remaining portion of parcel 3, or that parcels, 4, 7, 9 and 10 are not now used by complainant in its gas business, for the evidence shows the contrary to be the fact. I similarly decline to find as regard the land remaining in parcel 5, excepting one block valued at $400,000, which I have already excluded in my report (*ante*, p. 23).

Parcel 8 (Shadyside) has also already been excluded (*ante*, p. 23).

II. That of the plant taken over by the complainant from the constituent companies in 1884 at the appraisal valuation of $12,182,491, the following have been abandoned and are not now in use.

392	1. 111th St. works (p. 322 Ex.)		$826,175
	2. 18th St. works (p. 188 Ex.):		
	Block 1	$1,078,144	
	" 2	45,251	
	" 3	304,264	
	" 4	132,915	
	" 6	2,060	
	" 7	8,226	
	" 8	19,366	
	Misc.	113,309	
			1,603,535
	3. 60th & 61st St., p. 237		12,500
	Making a total of		$2,442,210.00

Thereby making the value of the plant taken over in 1884 and now in use, $9,740,281.41, according to the then appraisal thereof. If the Master shall refuse to find that all of said plant should be excluded that he find specifically as to each item above separately stated.

Disallowed, except as hereinafter set forth.

Item 1. The 111th Street works were appraised in 1884 at $826,175. as stated. This appraisal, however, covered the entire plant of the Harlem Gas Light Company, a portion of which was located on land afterward taken under condemnation proceedings, and the evidence does not indicate the exact value of the plant so condemned. As stated elsewhere (*ante*, p. 154) the land remaining is used in part for a holder station. Counsel have failed to indicate the evidence in support of their claim that any part of the plant has been abandoned.

Item 2. The parts of the 18th Street works described in the above request (Blocks 1 to 4 and 6 to 8 inclusive, and Miscellaneous) were appraised in 1884 at $1,796,421. instead of $1,603,535. as therein stated.

In determining the present value of the plant the estimate
393 of Mr. Mayer referred to (*ante*, p. 37) made due deduction for the value of so much of the plant as had been acquired by the City under condemnation proceedings. I am referred to no evidence indicating that any part thereof has been included as a part of the property now used in Complainant's gas business.

Item 3. The buildings at 60th and 61st Streets were appraised in 1884 at the figure stated. I have already found that the property on which they are situated is not to be regarded as abandoned (*ante*, p. 19).

III. That deducting from "the amount of capital and assets of the complainant as of June, 1884" (as found by the Master at page 6 of the draft report) $27,649,060 would leave the cost to the complainant of the assets now used by it to $21,845,850. as the proper cost-price, in accordance with said findings of the Master.

Disallowed. The finding at page 6 was that stock was issued to the constituent companies "For Plant and Property as above, $29,-994,000."

IV. That the complainant has invested, in addition to real estate, plant and property, since the appraisal in 1884 to October 31st, 1905 (Ex. 79, p. 347*a*) $9,693,565.90, making the total cost of the real estate, plant and property used by the complainant in its gas business $31,539,415.90, to which should be added the value of material and supplies on hand, $616,470.08 (draft report 42) or a total of $32,155,885.98.

Disallowed. The figures stated ($9,693,565.90), exclude working capital and some other assets, also $196,419.01 increase in Complainant's quick assets between June and November, 1884.

It may be added, as applicable generally to the above proposed findings I. to IV. inclusive (1) that I find the facts as to the cost to Complainant of its tangible property to be as set forth in Complainant's additional finding No. XI. (*ante*, p. 149) and (2) that there is fundamental error in the method suggested by coun-
394 sel for the State in arriving at the proper cost price. The evidence shows that the amount of Complainant's additional investment from 1884 to 1905, as shown by Ex. 79, viz., $9,693,-565.90, is a net amount arrived at after deductions of all amounts received from sale or condemnation of property. If, therefore, the value of real estate and plant sold since 1884 should be deducted from the gross appraisal values of 1884, and the above amount of subsequent investment be added to the balance remaining, the result would be a double deduction of the receipts for property sold.

V. That on December 4th, 1905, the complainant made a report for the year ending June 30th, 1905, to the State Board of Tax Commissioners, verified by Robert A. Carter, its Secretary, upon oath, that it was "a true, full and correct statement of the property of said company and the value thereof." That said report was made pursuant to Chapter 712 of the Laws of 1899, which required a full and correct statement of the property of complainant and of the true value thereof under oath. That in said report the value of its real estate, including plant, was given at $19,678,612.76; that

its mains and services were given at the value of $4,398,160.82; that its meters, stoves and other personal property were of the value of $2,736,290.48.

Allowed, and I so find, referring, however, for greater exactness to the report, as set forth in full at pages 383 to 396 of Exhibits, Vol. I; also referring to the discussion of the tax reports at pages 96 to 100, *ante*.

VI. That the daily capacity of the coal gas plants of the complainant is 9,500,000 cubic feet, and that the daily capacity of the carburetted water gas plants are 41,500,000 cubic feet. That the complainant is constructing at Astoria a modern "up-to-date plant, the best plant possible to be produced" (page 46 draft report), with a daily capacity of 20,000,000 cubic feet. That a similar plant with a daily capacity of 10,000,000 cubic feet could be constructed at a cost of $2,441,014.51 (test. of William H. Bradley, pages
395 1966-1978) exclusive of real estate and holder; or a unit of $244 per thousand of capacity. On this basis a modern, first-class coal gas plant of 9,500,000 cubic feet daily capacity could be produced for $2,318,000.

Allowed, so far as regards the first two sentences of the proposed finding, and disallowed as regards the remainder thereof.

From the record as cited it appears that the witness expressly stated that the figures regarding the Astoria cost, which he then gave at counsel's request, were not complete or accurate. They were supplemented later by a statement of items omitted, amounting in the aggregate to $4,327,930.67.

VII. That the cost of the 21st Street Station, which is a modern up-to-date plant, exclusive of holders, with a daily capacity of 27,500,000 cubic feet of carburetted water gas (Test. pages 83,223) was $123 per thousand cubic feet of capacity, which is a fair unit to assume as the value of the water gas plant, no matter what the capacity might be (test. of Frederick J. Mayer, pages 1567-1568). Upon this unit it would cost to reproduce the water gas plant of the complainant with a daily capacity of 41,500,000 cubic feet, $5,104,500.

Allowed, if after the figures $5,104,500 there be added the words "exclusive of holders," and I so find.

VIII. That the complainant entered into an agreement on or about April 26th, 1904, with the Standard Oil Company for 177,000,000 gallons of gas oil, 25% of which was to be a specific gravity of 34° at 4.625c, and the balance, 28° at 4.04c, (City's Exhibit 10). That up to November 1st, 1905, there had been delivered 7,000,000 gallons of the 34° oil and 82,000,000 gallons of the 28° gravity oil, leaving still to be delivered, under said contract, 88,000,000 gallons (see testimony, pages 925, 1014 to 1027, 1840 to 1844). That on or about November 1st, 1905, the complainant cancelled the aforesaid contract and entered into a new agreement (City's Exhibit No. 30) for 255,000,000 gallons of oil, 40% of 34° at 4.875c per gallon, and the remainder, 28° at 4.29c per gallon (page 977).

396 Allowed, and I so find. The evidence further shows and at the request of Complainant's counsel I find that the contract of April 26, 1904, provided for the delivery of high grade and

low grade oil in certain proportions "currently." The meaning of this term, as understood both by the Complainant and the Oil Company, was that oil must be taken from month to month in the proportions specified in the contract; so that while the Complainant had received under the contract an amount of oil considerably less *in toto* than the total specified in said contract, it could not call during the Winter of 1905-6 for all high grade oil. The use of high grade oil during the cold months to meet the requirements of the Act of 1905 prescribing 22-candle power after July 1st of that year was advised by the Chief Engineer. It was accordingly necessary to readjust the current contract and the contract of November 1st, 1905, was made for that reason. It is computed that the additional cost resulting added .0013 of a cent per thousand feet to the cost of gas for 1905.

IX. The master having found at page 128 that the complainant received for its coke $4.71 per net ton, he is requested to find that in Exhibit 94, item 8, the price per unit for coke should be $3.53 per load, and the amount $589,763.10, instead of $338,800.91; and item 11 net should be $542,919.64 and carried out under cost per M. c. f. sold 5.21, and the proper deductions made from the said Exhibit, reducing item 70 total operating from 74.81 to 72.41.

Disallowed. The evidence shows that the price $4.71 per net ton was gross; whereas the price received by complainant through the National Coal & Coke Company is subject to an allowance for cartage which the Coke Company retains. Furthermore, the price of $4.71 per ton is for screened coke, whereas screenings and "breeze" or broken coke, bring a very much lower figure. The amount shown in Exhibit 94, Item 8, is what was received for screened coke
397 delivered to the National Coal & Coke Company, less cartage, and for screenings and "breeze" delivered to the same Company, also less cartage, and for coke and screenings delivered to the water gas stations.

X. That in addition to the allowances made by the Master in Exhibit 94, that he allow the following in his computation of cost at page 123 of the draft report:

Item 47, repairs to gas stoves, $55,954.35 cost per M. cubic feet sold ..... .42
Item 53, street lamps, $289,259.09 cost per M. cubic feet sold.. 2.18
Item 62, real estate rents, $42,674.71 cost per M. cubic feet sold ..... .32
Item 66, in addition to the amount of taxes on excess dividends paid on stock invested in the securities of other lighting companies ..... .48

the following should be deducted; taxes on dividends in excess of 4% on $80,000,000., $120,000., and interest on unpaid taxes, $94,506.29 or 1.61c. per thousand cubic feet sold.

Item 67, contingent expenses, $1,328,316.37, or 10c. per thousand cubic feet sold.

Disallowed. There are apparently verbal errors in the foregoing, but I understand it to be a request for a re-consideration of the conclusions set forth at pages 123 and 124 *ante*.

XI. That the complainant in the year 1905, paid in dividends, $6,800,000. That its entire income from other sources than its gas business was $1,238,352 27 (Complainant's Exhibit 96, p. 382), thus leaving $5,561,647.73, or forty-one cents per thousand of gas sold paid in dividends.

Disallowed. To find as above requested would be misleading. The Exhibit referred to shows the total income to have been $4,853,-924.82, and that the difference between this amount and the total dividends paid was drawn from Surplus Account.

398 XII. That the sales of gas in the Borough of Manhattan are larger per capita than in any other City in the world, being in 1905, 9,250 cubic feet (Humphreys testimony, p. 1782; Marks testimony, pp. 2288, 2289). That during the five years from 1900 to 1905, the population of the Borough of Manhattan increased at the rate of 52,457 persons per year. A reduction in the price of gas leads to a proportionate increase in consumption in the City of New York to 46.46 cubic feet for each cent of reduction (pp. 2287–2289, City's Exhibit 46, 1404 M.).

Allowed, and I so find as to all except the concluding sentence, inserting, however, before the figures "9,250" the word "approximately."

Disallowed as to the concluding sentence. The evidence indicates that a reduction in price is not the only factor leading to increased consumption and does not lead to it in all cases.

The special findings requested by the State and hereinbefore referred to (*ante*, p. 160, Twenty-ninth objection), are as follows:

"The defendants, the Attorney-General and the State Commission of Gas and Electricity, request the special master herein to report the following special findings of fact:

First. That on September 29, 1884, the New York Gas Light Company, incorporated in 1823; the Manhattan Gas Light Company, incorporated in 1830; the Metropolitan Gas Light Company, incorporated in 1848; the Harlem Gas Light Company, incorporated for a period of fifty years, in 1855; the Municipal Gas Light Company, incorporated in 1876, and the Knickerbocker Gas Light Company, incorporated in 1876, entered into a consolidation agreement under chapter 367 of the Laws of 1884, whereby complainant was organized.

Found in substance, *ante*, *p.* 4.

Second. That said consolidation agreement (prepared by the representatives of the constituent companies, who constituted the directing committee under a previous pooling agreement), fixed the amount of the capital of the consolidated company, or com-
399 plainant, at $39,078,000, which was determined by multiplying the number of shares of stock of each constituent company by the then market price thereof.

Found, in substance, *ante*, p. 5.

Third. That of such authorized capital, $39,078,000, the sum of $35,430,060 was issued in payment of the properties and franchises of the consolidated company, subject to certain indebtedness, and that the remaining $3,647,940 was retained by the consolidated

company to provide for the payment of outstanding indebtedness of the constituent companies, and for other purposes, and was subsequently issued.

Found, in substance, *ante*, pp. 5, 6.

Fourth. That thereafter, and for the purposes of consolidation pursuant to the act, the said constituent companies, by their officers and employees, and by agents especially employed for that purpose, appraised their several properties, to be transferred to the consolidated company, as of the total value of $29,994,000, and that the properties of the constituent companies were, on or about November 11, 1884, transferred at that value to complainant.

Found, in substance, *ante*, p. 5.

Fifth. That the properties of the constituent companies, so as aforesaid transferred to complainant as of the value of $29,994,000, cost the constituent companies new, without allowance for either appreciation or depreciation of its several classes of property, the sum of $20,942,632.85, as shown by the books of account of the several companies.

Disallowed, see p. 42, *ante*.

Sixth. That the constituent companies, for the purposes of the consolidation aforesaid, by appraisers selected by them, appraised their land in excess of the then market value thereof and appraised their buildings, plant, mains, services and other tangible property at what it would then cost to produce the same new, as a part
400 of a going concern; and that, if the master should find the facts to be otherwise, he find and state the basis and method of such appraisal.

Disallowed. See p. 42, *ante*. As to the basis and method of such appraisal the evidence in the record is not sufficient to justify the specific finding requested.

Seventh. That on or about November 11, 1884, the first appraisal of the values of the properties of the several constituent companies, so as aforesaid made, was adjusted to cover additions to that date, and that said adjusted appraisal, as then made, was as follows:

Real estate	$10,332,000 00
Plant	12,182,491 00
Mains	5,233,962 10
Services	1,034,241 41
Meters	1,231,753 98
Meters, cocks and connections	11,926 53
Pipes and specials	88,398 43
Office furniture and fixtures	70,000 00
Horses, wagons and harness	1,115 00
Tools and implements	3,273 70
Gas stoves	1,256 45
Scows	.....
Franchises and rights	7,781,000 00
	$37,971,419 01

Allowed, and I so find.

Eighth. That complainant has invested in new construction, or in additions to its real estate, plant and property since the appraisal of 1884, to October 31, 1905, the sum of $9,693,565.90.

Allowed, and I so find with the additional statement that this amount is net after deducting various sums received as proceeds of land, plant or other property sold.

Ninth. That complainant had on hand on October 31, 1905, materials and supplies, necessary for use in the manufacture and distribution of gas, of the total value of $616,470.08.

Allowed, and I so find. See also *ante*, p. 42.

401 Tenth. That complainant, in December, 1904, by its secretary, R. A. Carter, filed a verified report with the State Board of Tax Commissioners, pursuant to chapter 712 of the Laws of 1899, which required a full statement of the property of the complainant and the value thereof, that its real estate, including plant, was of the value of $19,678,612.76; that its mains and services were of the value of $4,398,160.82; that its contract rights were of the value of $7,781,000; that its meters, stoves and other personal property were of the value of $2,733,516.90, and that its materials and supplies on hand were of the value of $595,410.39, and that its said mains and services, being property in the streets, highways and public places, were of the value, on the basis of reproduction new, of $5,801,466.10, as of date June 30, 1905, all of the total value of $35,189,700; that said report was made pursuant to chapter 712 of the Laws of 1899, which required a full and correct statement of the property of complainant, and of the true value thereof, under oath.

The figures 1904 in the first line should be 1905

Found as thus corrected, on the conditions stated under State's Additional Finding V, *ante*, p. 164.

Eleventh. That, in December, 1904, complainant filed its verified report with the State Board of Tax Commissioners, pursuant to chapter 712 of the Laws of 1899, which required a full statement of the property of complainant and of the value thereof; that in said verified complaint, complainant, by its secretary, R. A. Carter, stated that its real estate, including plant, was of the value of $19,673,075.42; that its mains and services were of the value of $4,261,156.39; that its contract rights were of the value of $7,781,000; that its meters, stoves and other personal property were of the value of $2,667,329.77; and that its materials and supplies on hand for use in the manufacture and distribution of gas were of the value of $697,014.92, all of the total value of $35,079,576.50; and that the present value of the property of complainant in the streets, highways and public places, or of its mains and services, on the basis of the cost of reproduction new was $5,613,321.12, all as of date of June 30, 1904.

Found in substance, *ante*, p. 97.

402 Twelfth. That complainant's constituent companies paid for the real estate used by it in its gas business, including additions and improvements, to November 11, 1884, the sum of $3,377,791.10, and that complainant paid for the real estate purchased by it, including improvements and additions thereto, from November 11, 1884, to December 31, 1905, the sum of $740,296.28;

that complainant's constituent companies wrote up the value of its real estate, prior to November 11, 1884, on account of appreciation, in the sum of $1,584,963.37, and that the complainant has written up the value of its real estate, on account of appreciation since November 11, 1884, in the sum of $369,065.53, or a total of $6,954,-028.90; that complainant has realized a profit of $142,378 on real estate sold by it since November 11, 1884; but that, if the master find the fact to be otherwise, as to amount, that he find and report the cost value of complainant's real estate, as above, and the several amounts written up on account of appreciation in the value thereof, and the profits realized on sales thereof, during the periods stated.

Disallowed, except as below stated. The cost of the real estate to the constituent companies was, as found *ante*, p. 26, much in excess of $3,377,891.10. These figures do not include the real estate of the Knickerbocker Company nor a considerable expenditure made on real estate account by the Harlem Company, and the proof shows that certain real estate of the Manhattan Company was carried on its books at less than its cost. The sum of $740,296.28 is less than the entire amount paid by Complainant for real estate, including improvements and additions thereto, for the reason that it represents a net sum, the receipts from real estate sold having been deducted from real estate expenditures, as previously stated. The amount $1,584,963.37 written up to appreciation was also a net amount representing increase in values by two Companies, less depreciation marked down by the Manhattan Company. The sum of $369,-065.53 stated to have been written up by Complainant on
403 account of appreciation, should be $5,369,065.53, but neither that sum nor the total stated of $6,954,028.90 correctly represents the amount of appreciation for the reason that neither the cost of the Knickerbocker real estate, the Harlem real estate and possibly other items were included in the so-called original cost. It is the fact, and I so find, that Complainant has realized a profit of $142,378. on real estate sold by it since November 11th, 1884.

Thirteenth. That the cost of the plant of the constituent companies, new, transferred to complainant, did not exceed the sum of $6,133,690; that the same was appraised for the purposes of consolidation at the sum of $12,283,403.73, of which about $6,049,-101.41 was pretended appreciation in the value thereof, arbitrarily written up; that the value of the plant of complainant on December 31, 1905, did not exceed the sum of $9,348,692; but, if the master find the fact to be otherwise, that he find and report the cost of the plant transferred by the constituent companies to complainant in 1884, with the additions and improvements thereto; the value thereof as appraised for the purposes of consolidation, and the cost of the plant purchased by complainant from November 11, 1884, to December 31, 1905, with the additions and improvements thereto.

Disallowed. The cost of the plant of the constituent companies, new, considerably exceeded the sum of $6,133,690., as found in discussing "cost of property" (p. 41, *ante*). I am referred to no evidence in support of the figures stated in the fifth line of the above request. The proof indicates that the plants of the constituent com-

panies were carried on their books at an amount greater than that at which they were appraised for the purposes of consolidation. It is not possible from the evidence to state the total cost to the constituent companies of their plants, mains, or similar tangible assets. As already stated (*ante*, p. 41), various amounts were arbitrarily written off on their books for depreciation and the evidence does not show how such amounts were sub-divided as between the various classes of property.

404 . Fourteenth. That the mains and services of the constituent companies transferred to complainant in 1884, cost, new, not to exceed the sum of $3,563,315.83; that they were transferred to the complainant at an appraisal valuation of $6,222,000; that, from November 11, 1884, to October 31, 1905, the complainant expended $2,618,188.93 for construction of new mains, and $177,829.68 for construction of new services, or $2,796,008.61; that the value of complainant's mains, as shown by its books on December 31, 1905, was $7,498,526.15, and that the value of its services, as shown by its books on said date, was $1,222,228.37, which includes the appraisal value aforesaid; that complainant reported the value of its mains and services, upon the basis of reproduction new, to the State Board of Tax Commissioners, as of date June 30, 1905, to be $5,801,466.10; that the difference between the cost value of complainant's mains and services and the value thereof as returned in the appraisals of the experts employed to inventory the value of the same in 1906, was upon the basis of the increased cost to install the same under conditions at present existing, under pavement that has been laid since their original installation, etc., and the difference between the expense of the cost of labor and materials in laying them at the present time, as compared with the cost thereof at the time of their installation.

Disallowed. The proof shows that the cost of the mains and services transferred to Complainant in 1884 was considerably in excess of the sum of $3,563,315.83 (see *ante*, p. 41). Furthermore, the mains and services of the Knickerbocker Company were not included in the figures of the accountants excepting in so far as they had been laid by the Municipal Company. The Complainant expended on mains between November 11th, 1884, and October 31st, 1905, $3,459,249.15, instead of the sum of $2,618,188.93. This figure and the sum of $177,829.68, stated to have been expended for construction of new services in the above proposed finding, are net figures representing new construction, less expenditures for renewals made. The proposed finding also omits any increase in mains and services between June, 1884, and November, 1884.

405 The values of mains and services as shown by Complainant's books on December 31, 1905, is as stated in the finding. Their valuation in the tax reports has already been considered (*ante*, pp. 96 to 100).

Fifteenth. That the increase in the value of the property of the complainant over the original cost thereof, including the cost of new construction, has been caused by the increase in the population of the city of New York, the development of its industries and com-

merce, the increase in the demand for complainant's product, the extension of paving and the change in the character thereof, and the estimated cost of reproducing the company's plant at the present time, under such conditions.

Counsel have failed to indicate the particular testimony relied upon in support of the above and the request is so broad in scope that it cannot otherwise be passed upon in all its details, in view of the length of the record. As to the increase in pavements and changes in the character thereof, see *ante*, p. 40. The increase in the value of the real estate is unquestionably due to the growth and general development of the city to which the laying and operating of gas mains doubtless in some degree contributed, especially in the outlying and thinly settled districts. The value of the plants and certain other tangible property, based on reproductive cost has naturally been affected by increases in the prices of labor and material.

Sixteenth. That of the balance of the stock of the Consolidated Company, after deducting $29,994,000 thereof, to be issued in payment for the property of the constituent companies, there remained, of the total so fixed, or $39,078,000, the sum of $9,084,000, of which $1,303,000 was set apart to be issued for working capital, and $7,781,000 was arbitrarily designated as representing the total value of the franchises and rights of the constituent companies.

Found in substance, *ante*, pp. 5, 6.

406 Seventeenth. That at the time of such consolidation, the constituent companies held and were operating in New York City, under franchises granted by ordinance, and to others, as follows: The New York Gas Light Company, of date May 12, 1823, for thirty years; the Manhattan Gas Light Company, of date May 5, 1848 for twenty years; the Metropolitan Gas Light Company, of date December 22, 1858, for thirty years; the Municipal Gas Light Company, of date March 22, 1876, for thirty years; the Anthracite Lighting and Heating Company, of date September 17, 1863, claimed by the Knickerbocker Gas Light Company, for the period of fifty years, and the Harlem Gas Light Company (incorporated in 1855 for a period of fifty years) of date April 25, 1855, without time limitation.

Found in substance, *ante*, pp. 52–72.

Eighteenth. That complainant does not now own, and since said consolidation has not owned, any other franchise to manufacture and distribute gas in New York, than those of the constituent companies heretofore referred to.

As above, under Seventeenth.

Nineteenth. That all of the franchises and rights sold or transferred by the constituent companies to complainant, under and by virtue of such consolidation, have expired, with the exception of the Anthracite Lighting and Heating Company, claimed by the Knickerbocker Gas Light Company, which will expire in 1913; but that, if the Master should not find the foregoing to be the fact, that he especially find and designate the franchises which complainant now owns to manufacture and distribute gas in the city of New York.

Disallowed, except as found, *ante*, pp. 52–72.

Twentieth. That the franchises to manufacture and distribute gas in the city of New York, or any part thereof, now owned or held by complainant, if any, do not exceed in value the sum of $200,000; and that, if the Master should find the fact to be otherwise,
407 that he designate the franchises so owned and held by complainant, and the value of each of them respectively.

Disallowed. There is no evidence in the record upon which a separate finding can be made as to the value of any one or more of the franchises.

The value of the property on which Complainant is entitled to a return is to be determined as of the present time, under the authorities (*ante*, p. 25). The franchises being now united in a single ownership, their present value must necessarily be considered as a whole and is not susceptible of apportionment.

As pointed out (*ante* p. 63) the power granted under certain of the older franchises held by Complainant are so broad that if one or more of the others were invalid or of no substantial value, it would not affect the value as a whole of Complainant's franchise rights as now exercised.

Twenty-first. That none of the constituent companies paid to the State of New York or to the city of New York, or to any of the governmental division thereof, any sum whatsoever as a consideration for any of the franchises granted to them, whether by the State or the municipality.

Disallowed. The record contains no evidence on this subject, excepting as specified at p. 78, *ante*.

Twenty-second. That, if the Master find that complainant is the owner of existing franchises to manufacture and distribute gas in the city of New York, that he find and state the elements of such value and his basis of reckoning same.

Found as at pp. 75-91, *ante*.

Twenty-third. That the cost of the manufacture and distribution of gas to complainant, or its cost of operation, for the calendar year 1905, as shown by its records and books of account, with proper adjustments, was 52.50 cents per 1000 cubic feet, as stated by the
408 audit of Marwick, Mitchell & Company, in the abstracts of the city's Exhibits C and D, as set forth at pages 1435, 1436 and 1437 of Exhibits, and that the report set out the several items of cost as therein shown and the allowances made therefor respectively; but if the facts should be found to be otherwise, that the cost thereof should be reported for each item as set forth in complainant's Exhibit 94, and in said abstracts.

Disallowed. See *ante* pp. 100-125.

Twenty-fourth. That the following items of cost, as set forth in complainant's Exhibit No. 94, and as adjusted by the audit of Marwick, Mitchell & Company, appearing at pages 1435, 1436 and 1437, were not proper items of expense to be allowed or computed as a part of complainant's cost of operation for the year 1905:

	Amount per M. cu. ft.
Cost of street lamps	$0.18
Interest on consumers' deposits	.39
Interest on funded debt	7.32
Tax on surplus profits, etc	1.62
Legislative and franchise litigation, etc	.61
Contingencies, less 1.71 cents allowed as depreciation	8.29

Disallowed, except as found *ante,* pp. 123, 124.

Twenty-fifth. That the item of street lamps, $289,259.09, as set forth in complainant's Exhibit No. 94, represents the cost to complainant of the maintenance of street lamps through which it supplied gas to the city of New York, during the year 1905, at a yearly rate per lamp, which yearly rate reimbursed the company for its expenditures on account thereof, and that said item is not properly chargeable as an element of the cost of gas supplied by complainant to private consumers.

Disallowed, see *ante,* p. 102.

Twenty-sixth. That the item "Interest on Consumers' Deposits," $920,685.80, as set forth in complainant's Exhibit No. 94, represents the sum total of deposits received by complainant from con-
409 sumers or customers of complainant, who are required by law to make the same; that complainant has used such deposits as a part of its working capital, and that the interest on the same, as shown, is not properly chargeable as an element of the cost of gas supplied to private consumers.

Allowed, and I have so found, *ante,* pp. 103, 124.

Twenty-seventh. That the item of fixed charges, $972,423.44, as set forth in complainant's Exhibit No. 94, represents the amount of interest on its bonded debt, and that the same is not properly chargeable as an element of the cost of making gas supplied to private consumers.

Allowed, and so found *ante,* pp. 101, 123.

Twenty-eighth. That the item of taxes, $965,843.88, as set forth in complainant's Exhibit No. 94, is made up in part of the following items:

Taxes on income from investments in other securities.	$5,257 48
Taxes on real estate from which the company draws rents	2,928 85
Taxes on dividends in excess of 4 per cent	120,000 00
Interest on unpaid taxes	94,506 00
	$222,692 62

That the foregoing items of expense on account of taxes are not proper elements of the cost of gas delivered by complainant to private consumers.

Disallowed, except as found, *ante,* pp. 104, 123.

Twenty-ninth. That the item of expense, general office, is made up in part as follows:

Legislative investigation expenses	$25,671 74
Miscellaneous extraordinary expenses	1,604 21
Claims for damages	3,800 00
	$31,075 95

410 That the items thereof are not properly chargeable as an element of the cost of gas supplied by complainant to private consumers.

Disallowed. See *ante*, p. 103.

Thirtieth. That the item "Contingent Expenses," $1,328,316.37, as set forth in the complainant's Exhibit No. 94, did not represent any actual expenditure of complainant, but was simply an estimate of charges on account of depreciation, entered by it on its books of account for the first time in May, 1905, and that the same is not properly chargeable as an item of expense of the cost of gas supplied to private consumers in the city of New York; but if the fact should be found to be otherwise, that the report should show just how much thereof is allowed on account of the actual expenditures of complainant, and the items of expense for which such disbursements were made.

Disallowed, except as found, *ante*, pp. 105-116.

Thirty-first. That the following items, as shown by complainant's Exhibit No. —, should be deducted from the cost of gas representing income incidentally derived by complainant from property devoted to the public use of manufacturing and distributing gas, upon the theory of the deduction of the income from residuals from the cost of gas, as shown by complainant's Exhibit No. 94:

Deduct stove rentals	$122,322 60
Discounts	9,497 57
Real estate rentals	37,408 88
Sundries	3,481 48
Dividends, National Coke & Coal Co.	5,000 00
	$177,710 63

Disallowed. See *ante*, pp. 101, 102.

Thirty-second. That the New Amsterdam Gas Light Company, the Standard Gas Light Company, and the Central Union Gas Light Company are domestic corporations engaged in the manufacture and distribution of gas in the city of New York; that they are owned by the Consolidated Gas Company, but that during
411 the nominal year ending October 31, 1905, they purchased the materials used in the manufacture and distribution of gas at the same prices which the Consolidated Gas Company paid therefor.

Found in substance, *ante*, pp. 49, 50.

Thirty-third. That the Standard Gas Light Company manufactured water gas and placed it in the holders during the nominal year ending October 31, 1905, at a total cost to it of 30.23 cents per 1,000 cubic feet; that the New Amsterdam Gas Company during the

nominal year ending October 31, 1905, manufactured water gas of an average candle power of 23.38, and placed it in its holders at a total cost to it of 29.01 cents per 1,000 cubic feet; that the Standard Gas Light Company, during the same period manufactured water gas of an average candle power of 23.73, and placed it in its holders, at a total cost to it of 30.23 cents per 1,000 cubic feet; that the Central Union Gas Company manufactured coal gas during the nominal year ending October 31, 1905, of an average candle power of not less than 22 sperm candles of 6 to a pound, and placed it in its holders at a total cost to it of 13.49 cents per 1,000 cubic feet; that the Consolidated Gas Company, at it- Forty-second street station, manufactured coal gas of the same candle power, during the same period, and placed it in its holders at a total cost to it of 25.59 cents per 1,000 cubic feet, and that the Consolidated Gas Company manufactured coal gas of not less than the same candle power during the same period at its Fourteenth street station, and placed it in its holders at a total cost to it of not less than 24.98 cents per 1,000 cubic feet; but that, if the master should find the fact to be otherwise, that he find and report the holder cost of gas to the companies above named, of the candle power, at the stations, and for the period named.

Disallowed, except as hereinafter stated. The holder cost to the Standard Gas Light Company was 30.26 cents (instead of 30.23) per thousand feet for the period in question, and to the New Amsterdam Company it was 29.01 cents, as stated. In the absence of any citation of the evidence showing candle power, I am unable to verify the figures given in the above request as regards these
412 two Companies. The gas manufactured by the Central Union Gas Company during the period in question did not exceed 14 or 15 candles, instead of 22, as above stated, and its cost was 19.64 per thousand feet instead of 13.49 as stated. The cost to the Consolidated Gas Company at its 42nd and 14th Street Stations was respectively .3773 and .3477, instead of as stated in the proposed finding. Various facts appeared in the record indicating that for purposes of comparison, the operations of the three Companies above named are not of value in determining the cost of gas to Complainant. (See *ante*, pp. 129–130.)

Thirty-fourth. That, if complainant had manufactured its coal and water gas during the year ending December 31, 1905, with reasonable prudence, economy and skill, and at the reasonably necessary cost thereof, it would have realized a saving in the cost of manufacture of its coal and water gas, as shown upon its Exhibit 94, of $532,444.57; but that if the master find the fact to be as stated, except as to the amount, that he find the amount thereof.

Disallowed. Counsel fail to refer to any evidence to justify such a finding.

Thirty-fifth. That, if complainant, during the year ending December 31, 1905, had purchased the oil used by it in the manufacture of gas, at the then fair market price thereof, or at the reasonable and necessary cost thereof, it would have made a saving in the cost of gas manufactured by it as shown by its Exhibit 94, of

$305,699.99; but that, if the master finds the fact to be as stated, except as to the amount of such saving, that he find and state the amount thereof.

Disallowed. See *ante,* pp. 126-127, also ruling on State's Additional Finding VIII., *ante,* p. 166.

Thirty-sixth. That if complainant had exercised reasonable prudence, skill and economy in the manufacture of its gas, as shown by said Exhibit 94, and had manufactured the same at the reasonable and necessary cost thereof, it would have manufactured
413 gas and placed it in its holders at a total cost of 26.68 cents per 1,000 cubic feet instead of 33.52 cents; but that, if the master should find the fact to be otherwise, that he state and find the reasonable and necessary holder cost of gas to complainant for the year ending December 31, 1905.

Disallowed, except as found, *ante,* pp. 123-124.

Thirty-seventh. That the Central Union Gas Company, during the year ending October 31, 1905, manufactured 24.93 candle power gas, and delivered the same to the consumers' meters at a total cost of 46.23 cents per 1,000 cubic feet, and that it manufactured carburetted water gas, of about 28 candle power during the same period, and delivered the same at the consumers' meters at a total cost of 51.96 cents per 1,000 cubic feet.

Disallowed. The average station candle power of the Central Union Company during the year ending October 31, 1905, was only 22.08. The gas sold by this Company was a mixed coal and water gas. I have been referred to no evidence in the record showing the cost of the same at consumers' meters.

Thirty-eighth. That the complainant has expended on account of repairs and renewals for the 20 years preceding 1905 an average sum of 10.89 cents per 1,000 cubic feet.

Allowed, and I so find, adding thereto, however, the words "of gas sold."

Thirty-ninth. That the complainant has expended, from November, 1884, to January, 1906, on account of repairs and renewals, a total sum of $17,392,512.68; that during the last eleven years of that period complainant's sales amounted to 56,878,689,000 cubic feet, and the amount expended for repairs, renewals, etc., was $6,967,874.39, or 12.25 cents per 1,000 cubic feet, for all sales; and that for the last eleven years of that period, its sales were $107,197,511,000 cubic feet, and it expended for repairs and renewals $10,424,638.29, or 9.73 cents per 1,000 cubic feet of sales.

Found in substance, *ante,* p. 113.

413½ Fortieth. That several of the coal gas plants which were transferred to complainant by its constituent companies in 1884, have been replaced with water and oil gas plants of the latest and most improved methods; that the maximum daily capacity of the water and oil plants of the complainant is 41,500,000 cubic feet, out of a total capacity of the complainant's plants in operation, amounting to 51,000,000, which does not include the 18th street plant; that all of the manufacturing plants of the complainant are in good and efficient condition and that four-fifths of the present generating capacity thereof are in the shape of modern up-to-date

water gas plants which could not be improved upon anywhere; and that one-fifth of the generating capacity thereof, or the coal gas plants, while possessed of some apparatus which is not of the latest pattern, are efficient and in shape to operate for an indefinite period without impairment; that the plants of complainant were in good condition, operating continuously and successfully when they were taken over by complainant in 1884, and are in good condition now,—better than they were at that time,—and are producing about twice as much gas, at a lower rate.

Allowed, and I so find.

Forty-first. That during the twenty years preceding the year 1905, all of complainant's expenditures on account of repairs and renewals, whether correct or final, actual or estimated, have not exceeded 10.89 cents per 1000 cubic feet, and that from the period of its organization in 1884, to May, 1905, complainant never charged off on account of depreciation or reserve, accrued or estimated, any sum whatever in addition to said 10.89 cents, actual expenditure.

Allowed, and I so find, changing the word "correct" in the third line to "current."

Forty-second. That every item of expense or loss arising out of disintegration, impairment or depreciation of complainant's plant, including its mains, services, meters, meter-cocks, etc., was fully covered during said period by the said disbursements of 10.89 cents.

Disallowed. The depreciation found by the witness Meyer, amounting to $604,988, was not covered thereby.

413¾ Forty-third. That the expenditures on account of repairs, as set forth in complainant's Exhibit No. 94, cover complainant's total expense or loss on account of disintegration, impairment or depreciation in its plant, mains, service, etc., for the year 1905; but that if the fact should be found to be otherwise, the report showed what items of expense, on account of the disintegration, impairment or depreciation in additon thereto, actually accrued, which were not covered thereby.

Disallowed, except as found at pp. 107-109, *ante*.

Forty-fourth. That in July, 1904, the complainant issued to its stockholders 6 per cent. debenture bonds, convertible into stock at par, at the option of the holder, to the amount of $19,857,600; that the average market price of the debenture bonds issued during the year 1905, was $174.75, yielding a net return to the investor therein, at that price, of 3.4 per cent.

Allowed, and I so find.

Forty-fifth. That the average market price of the stock of complainant during the year ending December 31, 1905, was $192.33, or $92.33 above par, which yielded a return to the investor, upon the basis of investment, at that price, of 4.1 per cent. upon his cash investment.

Allowed, and I so find.

Forty-sixth. That complainant, by virtue of its own business and the control of the business of the New Amsterdam, Standard, Central Union and New York Mutual Gas Light companies, and by virtue of its control of the companies engaged in the business of the manufacture and distribution of electric current, has a virtual

monopoly in the supply of gas and electricity in the boroughs of Manhattan and The Bronx, in the city of New York; but, if the master should find the fact to be otherwise, that he find and report the names of the competitors of complainant in the manufacture and distribution of gas therein, and the names of the companies engaged in the manufacture and distribution of electric cur-
414 rent therein, which are competitors of the companies owned and controlled by the complianant."

Disallowed, except as found at p. 49, *ante,* as amended by complainant's Finding III., *ante,* p. 147.

Addenda.

"1. That the master find and report severally the present value, or the value as of about December 31, 1905, upon the basis of the present cost of reproduction new, less depreciation (stating the basis or the principles which govern the determination thereof), of the real estate, plant, mains, services, meters, meter cocks and connections, pipes and specials, tools and implements of complainant, claimed by complainant to be devoted by it to the public use, and that the master finds to be so devoted to the public use.

Found as in report *passim.*

2. That the master find and report the present value, upon the basis of reproduction new, less depreciation (stating the basis or the principles which govern the determination thereof), of the property set forth in paragraph one above, but which the master finds was *not* devoted by complainant to the public use.

Found as in report *passim.*

3. That the master find and report the present value upon the basis of the present cost of reproduction new, of the property set forth in paragraphs one and two above, claimed by complainant to be devoted to the public use.

Found as in report *passim.*

4. That where the master is requested at any paragraph hereof to find a certain fact, as of a stated sum or amount, and he finds the fact to be as stated except as to the sum or amount, that he find and report the fact in accordance with the sum or amount found by him."

Disallowed, excepting as hereinbefore found.

415 *City's Objections and Amendments.*

On behalf of the defendant The City of New York there was presented a memorandum, evidently prepared to a considerable extent by the expert witnesses instead of by counsel. In view of its length and as in many respects it does not conform to the practice, said memorandum is not set forth in full but is filed herewith. Such extracts therefrom are herein-fter made as suggest specific changes in or additions to the draft report or such objections thereto as are deemed pertinent for the information of the court.

"First. * * * The complainant company in its 'Brief for the Complainant on the Question of Franchises and Good Will' dated June 4, 1906, and submitted to Mr. Justice Lacombe on the argument of the motion for an injunction herein claim (page 2) special franchises are property in the fullest sense, that the operating franchises of a corporation must be paid for in condemnation proceedings (p. 4) and that the same principle is applicable to rate regulation (p. 5). 'If the operating franchise', say counsel for the complainant on page 5 of the brief referred to, 'of a public service corporation constitutes property for which compensation must be made where property is taken under the right of eminent domain, it requires no argument or precedent to make it clear that the same principle must be applied where the Legislature seeks to regulate the rates charged by such corporation. In both cases the property of the corporation is taken in the interest of the public.' Assuming this to be so, there can be no recovery in a condemnation proceeding for property taken under the right of eminent domain until the party claiming to be injured by such taking has proven his title to the property in question. This the complainant has utterly failed to do either as to the franchises or the real estate to which the city claimed the company had no title. Therefore the Master should find the fact to be that as to the franchises claimed and the particular real estate referred to, the complainant had proved no title and could not base any capitalization thereon in this case."

Disallowed. See pp. 21, 22 and 62–72, *ante*.

416 Second. The evidence in this case is that the complainant company owns or controls all the gas and electric lighting companies operating in the Boroughs of Manhattan and the Bronx with the unimportant exception of the Bronx Gas and Electric Company (see States Ex. D., Schedule L, p. 408 Ex., Report of Stevens' Committee, p. 41), and the Master should so state in his final report.

Found as at p. 49, *ante*, as amended by Complainant's Finding V., *ante*, p. 147.

Third. The evidence in this case shows that the consumption of gas in the Borough of Manhattan is greater per capita than in any other city in the world (See Sten. Min., p. 781), and the Master should so state in his report.

Allowed and I so find. See *ante*, p. 168.

Fourth. It is conceded in this case, and the evidence shows that the land of the complainant used in the business of manufacturing gas, is no more valuable as land for that purpose to-day than when it was first acquired, and the Master should so state in his report. (Sten. Min. pp. 1766, 6825).

Disallowed, except as below set forth.

I find no concession to the effect stated. There is no evidence that the land *alone* is more valuable for purposes of gas making than it was when purchased. Mr. Bradley testified that in several of the plants he had put in more apparatus on the same number of square feet than formerly, which made the land more valuable for gas making purposes.

Dr. Humphreys testified that appreciation in the value of real estate did not add anything to its earning capacity so long as it was occupied by a manufacturing plant.

Fifth. On line 21, page 8 of the draft report, change "it was conceded" to read, "it was claimed by complainant," and add, after the word "selected" on page 8, line 26 of report, the words "by the complainant."

417 The defendants were refused permission to examine the accounts of the company for any other period. (Sten. Min. pp. 2778, 2915.)

Disallowed. The Defendants cited authorities holding that the value of Complainants' property devoted to public use should be taken as of the time of such use (*Ante*, p. 25). Counsel for the State in their brief set forth as one of the issues herein "Determination of the value of Complainants' property devoted to the public use approximately as of date of the order of the Commission and of the enactment of said Chapters, namely, 736 Laws of 1905, and 125 Laws of 1906." Defendants' representatives were in numerous instances permitted to examine Complainants' books for periods anterior to 1905.

Sixth. The Master should state in his report that the witnesses McHale and Thompson had prior to the trial of this case examined the real estate of the complainant, having been employed to do so by the complainant, and testified to the value of the same on behalf of the complainant as its expert witnesses as to the value of the land in *certiorari* proceedings to review the assessment thereon of the Tax Commissioners. (See Sten. Min. pp. 2725, 2814.)

Allowed, and I so find with the qualification that the employment in question, which was some two or three years prior to this suit, did not embrace a general appraisal of Complainants' real estate but only certain parcels then the subject of tax litigation.

Seventh. The Master should state in his report that as shown by the testimony of the witnesses called by The City and the charts offered in evidence, increased consumption is the rule where there is reduction in the price of gas in the City of New York, and that because of such rule and increased population, the sales of the complainant company would be 15,300,000,000 cubic feet in the year 1907. (See Sten. Min. pp. 3073-6—City's Exhibit 57.)

Disallowed. See *ante*, p. 168, State Finding XII.

418 Eighth. The testimony of Mayor, who appraised the plants for complainant, is that he spent 3,800 hours in viewing and appraising the property, and 3,800 hours more in tabulating the result of such examination and appraisal, and that it was absolutely necessary to take that time even with all the data and special facilities he had as expert for the company; whereas the experts for the defendant were at first denied any opportunity to inspect the plants and then only allowed a very limited and inadequate time in which to make such examination and appraisal. (See Sten. Min. p. 2773-2776, 2419-2420, 2466-2469, 6600, 6670, 5244-5250, 2106.)

Allowed, and I so find, in so far as regards the testimony of Mayer.

As regards the remainder of the finding, disallowed, excepting as below set forth.

Complainants' counsel claimed that Defendants were not entitled to an inspection of the plants, and in the first instance refused to permit it. Later the opportunity to make such inspection was granted, Complainants' counsel stating that this was done as a matter of courtesy, and not because the right was conceded.

In the latter part of August, 1906, while complainant's case was still in progress, an application was made on behalf of the State for an order permitting such inspection, but this application was postponed and subsequently withdrawn, as appears from a memorandum of the Circuit Judge filed herein on October 10, 1906 (Record, p. 2742). Complainants' main case was closed on Sept. 14, 1906, and an adjournment was taken at Defendants' request to October 1, 1906. In the interim a motion was made by the City before the Circuit Judge for an order permitting among other things an inspection of the plants. After an adjournment at the City's request this motion was duly heard, but as appears from the memorandum above referred to, it was settled by consent so far as regards the inspection of plant, Complainant not objecting. The State's
419 first witness on the subject of plant was called on November 22d, 1906, and the City's first witness on that subject on December 5, 1906. The latter stated that his examination of the plant had been begun during the previous week.

It is clear that by the exercise of proper diligence Defendants could have secured inspection of the plants at a much earlier date than it was in fact begun and this fact was repeatedly brought to the attention of counsel during the progress of the hearings.

Ninth. The testimony of Bradley, the Chief Engineer of the company, is that without a detailed and exhaustive examination of the plants and apparatus, no proper appraisal could be made. (Sten. Min. p. 173).

Allowed and I so find.

Tenth. The evidence in this case is, as appears from Sten. Min. p. 5505 *et seq.*, and complainant's exhibits 286 to 294, that the congested conditions of the subsurface of the streets is largely due to the unnecessary duplication and quadruplication of gas mains due to the consolidation of the constituent companies of the Consolidated Gas Company already operating in the same territory at the time of the consolidation in 1884.

Disallowed. The evidence fails to show duplication to any large extent of the mains of the constituent companies. There is however more or less duplication due to the presence in the streets of the mains of the Standard and New Amsterdam Companies, both organized subsequent to the consolidation. Over 56% of the City blocks have but a single main, and over 86% have two mains or less.

Eleventh. The evidence in this case shows that the consolidation of the constituent companies did not result in reduced cost of operation, but so far as oil is concerned, tended to and did increase the cost of the same because, as claimed by the company, of the great quantities required they could get it but from one Company,—the

Standard Oil Company,—and then at any price fixed by said
429 company; so that the Gas Company is entirely at the mercy of the Oil Company.

Disallowed. Counsel have failed to indicate any evidence to the effect that the consolidation did not reduce operating cost. There is some evidence from which a contrary conclusion might be shown. In one of the tables prepared by the accountants for the Senate Committee of 1885 the cost of gas to five of the constituent companies per thousand feet was stated as follows:

Manhattan Gas Light Co.	$1.0676
Metropolitan Gas Light Co.	.9171
New York Gas Light Co.	1.0771
Harlem Gas Light Co.	1.0237
Municipal Gas Light Co.	.9845

As to oil see *ante*, pp. 127, 128.

"Referring to the statements contained in the Report regarding the testimony of Dr. Marks, the following corrections should be made:

Correction to Master's Report No. 1.

(Master's Report, p. 36). "In this view he made estimates on the theory that the cost of final replacements to cover such an inadequacy or obsolescence ranging from 25 to 60% and based on the supposed life of 120 years for the plant" (Defendants' Brief, p. 113; Testimony, p. 6696).

Substitute: "In this view he made estimates on the theory of the cost of final replacements to cover such an inadequacy or obsolescence would be about 21% for the average of buildings, gas meter apparatus, yard connections and holders."

Disallowed.

Correction to Master's Report No. 2.

(Master's Report, p. 36): "The fact thus being that the plants are in good order and operating efficiently it does not appear
421 reasonable for the purposes of this case to charge them with a theoretical deficiency so great as if actually existing would make their successful operation a practicable impossibility." Please eliminate this as incorrect and not in accordance with the facts.

Disallowed.

Correction to Master's Report No. 3.

(Master's Report, p. 32): "Neither as a rule did he make allowance for piling or other expensive foundations." (See Test., pp. 5251, 5256, 5266).

Please eliminate above statement as incorrect and not in accordance with the facts.

Disallowed.

Correction to Master's Report No. 4.

(Master's Report, p. 32): "Mr. Marks did not disagree materially with Mr. Mayer in his estimates as to apparatus and holders. They are due chiefly to the fact that Mr. Mayer included the cost of installation whereas Mr. Marks estimated what is known as "sidewalk delivery" of the apparatus. Other differences appear in the cases where Mr. Marks has assumed a different weight of material." (Refer to Complainants' Ex. 70; Test., pp. 6680, 6687, 6693; Defendants' Brief, pp. 113, 115, 115 Recapitulation).

Please eliminate above statement as not in accordance with the facts.

Disallowed.

Correction to Master's Report No. 5.

(Master's Report p. 35) "Mr. Marks did not regard the extent of depreciation actually existing but assumed a theoretical deterioration of the supposed life of the plant."

Refer to Testimony p. 5063, and following giving inventories of all stations of Consolidated Gas Company in Manhattan.

These inventories show that neither buildings nor water gas apparatus nor holders built within the last five years have been subjected to any depreciation whatsoever. Please eliminate as not in accordance with the facts and the testimony.

Disallowed.

422 *Correction to Master's Report No. 6.*

(Master's Report p. 31): "As hereafter pointed out they were corroborated in many particulars by the defendants' own witnesses and although subjected to careful examination by the latter and a full cross examination by counsel, no errors became apparent which would materially affect the general result of his computations."

Refer to testimony, pp. 6687, 6693, Defendants' Brief, pp. 115, 116, showing error of $749,000 in four items and objecting to the addition of 10% and 5% to inventories.

Please eliminate as not in accordance with the facts and testimony and exhibits.

Disallowed. The so-called errors arise from certain discrepancies pointed out between the witness' valuations of 1906 and those made in 1884 by Mr. Rowland, who appraised the plants for the purpose of the consolidation.

It was not satisfactorily shown that the buildings were in the same condition at the two dates named. Furthermore, the evidence indicates that the Rowland valuations as to buildings were probably much below their actual value. For example, one of the buildings at the 21st station appraised for Defendants by Mr. Marks at $27,890, and by Mr. Edgerton at $27,000, appears in the Rowland schedules to be valued at $5,000.

Correction to Master's Report No. 7.

(Master's Report, p. 93) "Considerable stress was laid by some of the witnesses upon the gas statistics of other cities." "Such evidence cannot be regarded generally as of value because the variance in local conditions is so great as to make accurate comparisons impossible."

Refer to testimony, pp. 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, Defendants' Brief, pp. 110, 111.

The difference in cost of structures may amount to an increase of 10 to 25% but the difference in sales of gas *per capita* between Manhattan and other cities is 100% or more in favor of Manhattan.

The valuation of Boston Gas Works was fixed by an inexpert
423 legislature. The valuation of Philadelphia Gas Works is based on a mere suggestion and is not testimony.

Please eliminate as not in accordance with the facts or the testimony.

Disallowed.

Correction to Master's Report No. 8.

(Master's Report, pp. 34-5.) "But obviously they are a necessary part of any estimate of reproduction cost, as Mr. Marks admitted."

See Defendants' Brief, p. 116.

See City's Exhibits 125 to 135 inclusive.

Please eliminate as not in accordance with the facts and the testimony.

Disallowed.

Correction to Master's Report No. 9.

(Master's Report, p. 38): "It was shown by the complainant that mains of the aggregate value of $2,891,690.22, at Mr. Marks' prices, had in fact been laid by contract.

"A computation of the 15% contractors' profit suggested by Mr. Marks would accordingly add $433,753.53 to his cost valuation."

"It was further shown that his estimates were bases on an assumed mileage very much less than actually existing."

An assistant to Mr. Marks, after measuring five maps, failed to include them. The Master did not permit this testimony to be corrected when offered, but made use of corrected figures in Defendants' Brief, p. 118.

Mr. Simpson's testimony, p. 5454 and 5455, made use of contractors' prices which include 15% on the cost in City's Ex. 50, and then added an additional 15% to obtain $433,753.53.

Refer to Defendants' Brief, p. 117.

Please eliminate as not in accordance with the facts and the statements in Defendants' Brief.

Disallowed.

424 *Correction to Master's Report No. 10.*

(Master's Report, p. 43.) "It appears however from the reports of the Massachusetts Gas Commission that there are included as part of the capital of the companies in question certain notes payable which the witnesses had omitted in his computation. As corrected it appeared that the Massachusetts Gas Companies were employing about 48c. per M. cu. ft. for their active capital and on a like basis according to complainant's sales a proper working capital would be upwards of $6,000,000."

Dr. Humphries received from the Massachusetts Gas and Electric Light Commission a letter stating that these notes payable were considered as bonds because they were used for the structural assets and considered a part of the fixed capital sunk in construction.

Therefore these notes payable in no wise affect the liquid assets of the companies leaving 13c. per M. cu. ft. of sales as correct for this purpose.

Please eliminate as not in accordance with the facts or the letter from the Massachusetts Gas and Electric Light Commission. (Testimony p. 6857.)

Disallowed.

Correction to Master's Report No. 11.

(Master's Report, p. 52): "He computed its value at $5,000,000 on the assumed cost of only $1.78 per M. cu. ft. of annual capacity but this would appear to be inadequate.

Refer to Defendant's Brief p. 111 and to testimony pp. 2348 to 2358. The $1.78 is deduced from the official figures of the four Massachusetts companies and is not "assumed." No proof from these companies or their representatives of the incorrectness of $1.78 has been adduced proving the incorrectness of $1.78.

Please eliminate as not in accordance with the testimony and the facts.

Disallowed.

Correction to Master's Report No. 12.

(Master's Report p. 46): "For the purpose of determining
425 present value however, particularly on the basis of the cost of reproduction, the method followed by Mr. Marks does not commend itself."

The Master has forgotten that the Astoria plant is to replace and reproduce the existing plants which should be deducted from its cost as abandoned and sold.

Please eliminate as not in accordance with the facts and the statements of the Complainant's witnesses.

Disallowed.

Correction to Master's Report No. 13.

(Master's Report, p. 90) "The reasonable value of which I think may be fairly fixed at the sum of $20,000,000."

As the franchise is a gift of the public costing the company nothing and as the franchise tax is charged to the cost of gas and costs nothing to collect, the consequence is the Consolidated Gas Company has expended nothing and invested nothing for a franchise.

The alleged franchises have no value on which a return should be charged against the gas consumer and the Report should so state.

Disallowed.

Correction to Master's Report No. 14.

(Master's Report p. 113: "Depreciation of 5% on electric lighting plants."

Please eliminate as having no proper relation to the depreciation of Gas Works.

Disallowed.

Correction to Master's Report No. 15.

(Master's Report, p. 116.) "9 cents per M. cu. ft."

Please eliminate as further reading of "Finances of Gas, Electric Light and Power Enterprises" shows this arbitrary statement to be qualified.

Disallowed.

426 *Correction to Master's Report No. 16.*

(Master's Report p. 140): Apparent price of gas obtained $1,034. True price of gas $.998/ Difference 3.6 cents.

(Master's Report p. 123)

Apparent cost of gas	65 84/100c.
Less	3 6/100c.
True cost of gas	62 24/100c.

This is the corrected cost of gas according to the Master's method if there is subtracted the amount by which the apparent price of gas exceeds the true price of gas making all allowances in the cost of gas claimed by the Master.

Disallowed.

On page 52 of the Report, second line of section headed "Franchises" add after the word "was" the words "attempted to be."

Disallowed.

Change the second paragraph on page 53 so as to read "additional stock of the new company was issued for franchises and rights to the extent of $7,781,000," and an item franchises and rights

$7,781,000 is still carried on the books of the company. This stock was apportioned between the constituent companies as follows," etc.

Disallowed.

Page 61, line 1, after the word "the" at the commencement of the line, add "consents." After the word "licenses" add the words "estimated to be."

Allowed as to "consents." Disallowed as to the remainder.

Strike out the paragraph marked 3, as the statute referred to, Chapter 367, Laws of 1884, does not apply to the complainant.

Disallowed.

427 In the paragraph marked 2, under the statement "it is claimed by the defendants" after the word "although" in line 7, strike out "by its terms unlimited as to time necessary expired with the termination of" and add instead thereof the words "the limit of its term is not expressly stated therein and could not survive the company's corporate existence," and add at the end of said paragraph 2 the words "and therefore had no power to use the streets of the municipality even though the latter may attempt to consent to such use," and on the last line after the word "was" insert the words "alleged to have been."

Disallowed.

After the word return on line 10, add the words "as against the consumer."

Disallowed.

On page 63, there is no evidence to support the statement in the second paragraph reading "in short so far as the present record shows the municipal authorities have fully acquiesced in the continued use and occupation of the streets by complainant."

Overruled.

It is respectfully submitted that the objection made by the city that there is an entire absence of proof that the grantees under this act of 1871 met and selected an executive committee was not technical.

Overruled.

On page 64, there is no evidence of any extension of the consent to the Harlem Company referred to on this page.

Overruled.

On page 66 there is no reason stated for the conclusion expressed "although this statute is claimed to be unconstitutional its validity must be assumed for the purposes of the present proceeding.

Overruled.

428 On page 67 the words "unlimited as to time" on lines 4 and 5 should be stricken out and the words "not specified in the consent itself" inserted instead thereof.

Overruled.

Besides the foregoing a general objection is urged that the Master's statements are as a rule too broad, and frequently in stating that no proof exists, impose upon the defendants the burden of proving a negative.

Overruled.

Report page 38. A return of 10% or 15% is not expected or re-

quired where there is a monopoly. This was the testimony of complainants' own witnesses and is at variance with the statement of the Master appearing on this page. (See Sten. Min. pp. 2077, 2079.)

Overruled.

It should be stated in the Report that although complainant's officers were examined as to the terms and conditions under which the Consolidated Gas Company was receiving gas from the Astoria Light, Heat and Power Company, they were unable to do so stating no arrangement had been made as yet.

Disallowed.

In view of the fact that requests to find have been submitted by the Complainant and by the State although it was understood no request as to findings would be required by the Master prior to the coming in of the Report, the defendant, The City of New York, asks leave to adopt and present on its behalf the Requests for Special Findings heretofore presented in behalf of the State."

So ordered. The fact is that no findings were required, and counsel were so informed when the taking of testimony was closed.

"At page 37 of Report, the Master allows the round figure
429 $15,500,000 for the manufacturing plant and holder stations, the capacity of which is 51,000,000 daily. Of this capacity 38,000,000 daily is due to the water gas stations at 44th, 71st and 99th streets. The maximum allowance as to cost of the various water gas plants, per 1000 daily capacity is stated by Mr. Meyer at $125.00, and for storage or holder capacity $80.75 per 1000 cu. ft. contents, as appraised by Mr. Meyer, at 132nd street and 111th street. (Sten. Min., pp. 1568, 1389, 1391.)

All of the 3,000,000,000 of gas bought from other companies was water gas, and the average delivery for 200 days was equal to 15,000,000 a day. The capital required to make and store this gas is, according to complainant's testimony $205.75 per thousand daily capacity. (Sten. Min., pp. 1389, 1391).

On this basis, capital required for making and storing 15,000,000 cu. ft. would be.....	$3,086,000
Real estate required on the basis of water gas.....	750,000
	$3,836,000

instead of $12,000,000 as allowed by the Master for property of other companies devoted to use of complainant Error of Master's findings on this item, $8,164,000 which should be deducted from the sum, total

Also on that account, should be deducted the 10% profit allowed other companies on the labor and material used, to make complainant's gas.

The defendant the City of New York submits for the consideration of the Master.

Estimate of the amount of Real Estate required for the manufacture of 15,000,000 ft. water gas (daily) and cost of the same

based upon New York (Manhattan) valuation and requests that he amends his Report by a finding in accordance therewith."

430

Exhibit 125, page 1692, Exhibit Item.		Area sq. ft.
25	Generator house over Machine 6–13	10,200
27	Generator house 2nd St. 5 machines	15,096
35	Purifier house	12,243
36	Condenser & Scrubber house	12,243
37	Purifier house	12,243
39	Shaving and Scrubber house	12,243
40	Exhauster house	3,205
19	Engine room machine shops & gangway	13,124
20	Engine room	6,864
	Total square feet	97,461

	Area.	Valued at	
Block 978	121,700	$537,000	See Master's
" 979	133,900	570,000	Report p. 14
	255,600	$1,107,000	

Pro rata value of 97,461 sq. ft. $420,660
Daily capacity.. 24,000,000 cu. ft.
Pro rata value for 15,000,000 daily 263,905

Real Estate for 15,000,000 holder capacity 132nd Holder Station as a basis

Block 1999—662'5 long 199'83 wide

	Diameter.	Depth.
3 Holder tanks	192' 9" x	40' 1"

Capacity of each holder 5,000,000
Total capacity. 15,000,000

Block valued by Master (Page 15 " Report ") $445,000

Value of real estate pro ratio to 15,000,00 for building area 97,461 263,905
Value of real estate for holders 445,000
$708,905
Add coal & oil storage 40,000
Total $748,905

431 Disallowed. Without discussing the foregoing in detail, several inaccuracies and omissions may be noted.

The evidence shows that all of the 3,000,000,000 feet of gas bought from other Companies was not water gas but a part thereof consisted of coal gas produced in the plant of the Central Union Company.

The testimony as cited does not appear to sustain the contention that $80.75 per thousand cubic feet is a sufficient allowance for storage or holder capacity. Both the 111th and 132nd Street holders are valued at more than $100. per thousand, while the 63rd Street holder, with accompanying apparatus and pipe connections, is valued at $163. per thousand. This would make an aggregate of $288. per thousand for plant and holder capacity instead of the $205.75 assumed above.

Complainant's Manhattan capacity being 51,000,000 feet and its sales 70,000,000 feet per maximum day in 1905, an actual capacity of 19,000,000 cubic feet was necessary in addition to Complainant's Manhattan plants instead of the 15,000,000 feet assumed in the above calculations. Furthermore, the above figures make no allowance for the necessary reserve capacity which, without contradiction, was fixed at 20 per cent. above the actual sales.

There is also no allowance for the value of that portion of the mains and general distribution system of the other Companies which is employed in sending and delivering the purchased gas and which should be taken into account in addition to the land and plant required for the production thereof.

As regards the cost of real estate, estimated at $750,000, what has been already said as to the capacity required and the necessity of providing for reserve is fully applicable. Furthermore, the testimony is undisputed that the 21st Street land is crowded with apparatus and a greater area would be required if a new plant

432 were to be constructed. No allowance is made for a proper proportion of the land used for general holder purposes not located immediately at the 21st Street plant, but which is necessary for handling its output.

The following additional findings were subsequently requested by the City regarding the Astoria plant. Without reviewing the same in detail, I may state generally that I do not find that the evidence sustains the contentions of counsel and the said requests are each of them hereby disallowed.

"First. That the stations of the Consolidated were ample to supply the Consolidated business and still have a margin of 11% in January over the average day's output and 27% over the average day's output in December.

"Second. That the stations of the subsidiary companies with their maximum capacity of 62,000,000 and maximum day's output of but 30,000,000 have ample capacity to fulfill their contracts with the Consolidated Company and still leave a large margin for their own growth.

"Third. Under these conditions it is in the highest degree inequitable to impose a capitalization of $12,000,000 for a third plant

(Astoria) which under the conditions is shown to be totally unnecessary to the gas supply of New York."

The draft report, amended in the respects hereinbefore specified, is accordingly signed and filed as my final report herein.

All of which is respectfully submitted.

ARTHUR H. MASTEN,
Master in Chancery.

Dated New York, June 24th, 1907.

433 (Endorsed:) Circuit Court of the United States, Southern District of New York. The Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District-Attorney of New York County, Frederic C. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity and The City of New York, Defendants. (Copy.) Master's Report. Filed June 24th, 1907. U. S. Circuit Court, Southern District N. Y. Filed June 24, 1907. John A. Shields, Clerk.

434 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY
against
JULIUS M. MAYER, Attorney-General; THE CITY OF NEW YORK, ET AL.

Before Arthur H. Masten, Esq., Special Master.

Corrections, Amendments and Additions to the Special Master's Report Proposed by the Defendant The City of New York.

The City of New York, under the notice given herein, dated May 18, 1907, submits the following for the consideration of the Master:

First. It is suggested apropos of the statement of the Master on page 46 of the proceedings on May 28, 1907, as follows: "All I say is that the Gas Company is in possession of the field. They are presumed to have title as I am presumed, if I pay taxes on a house and say it is mine, to own the house," that the complainant company in its "Brief for Complainant on the Question of Franchises and Good Will," dated June 4, 1906, and submitted to Mr. Justice Lacombe on the argument of the motion for an injunction herein claim (page 2) special franchises are property in the fullest sense, that the operating franchises of a corporation must be paid for in con-
435 demnation proceedings (p. 4) and that the same principle is applicable to rate regulation (p. 5). "If the operating franchise," say counsel for the complainant on page 5 of the brief referred to, "of a public service corporation constitutes property for which compensation must be made where property is taken under

the right of eminent domain, it requires no argument or precedent to make it clear that the same principle must be applied where the Legislature seeks to regulate the rates charged by such corporation. In both cases the property of the corporation is taken in the interest of the public." Assuming this to be so, there can be no recovery in a condemnation proceeding for property taken under the right of eminent domain until the party claiming to be injured by such taking has proven his title to the property in question. This the complainant has utterly failed to do either as to the franchises or the real estate to which the City claimed the company had no title. Therefore, the Master should find the fact to be that as to the franchises claimed and the particular real estate referred to, the complainant had proved no title and could not base any capitalization thereon in this case.

Second. The evidence in this case is that the complainant company owns or controls all the gas and electric lighting companies operating in the Boroughs of Manhattan and the Bronx with the unimportant exception of the Bronx Gas and Electric Company—(see States Ex. D., schedule L, p. 408 Ex., Report of Stevens' Committee, p. 41), and the Master should so state in his final report.

Third. The evidence in this case shows that the consumption of gas in the Borough of Manhattan is greater per capita than in any other city in the world (see Sten. Min., p. 781), and the Master should so state in his report.

Fourth. It is conceded in this case, and the evidence shows
436 that the land of the complainant used in the business of manufacturing gas, is no more valuable as land for that purpose to-day than when it was first acquired, and the Master should so state in his report. (Sten. Min., pp. 1766, 6825.)

Fifth. On line 21, page 8, of the draft report, change "it was conceded" to read "it was claimed by complainant," and add, after the word "selected" on page 8, line 26, of report, the words "by the complainant."

The defendants were refused permission to examine the accounts of the company for any other period. (Sten. Min., pp. 2778, 2915.)

Sixth. The Master should state in his report that the witnesses, McHale and Thompson, had prior to the trial of this case examined the real estate of the complainant, having been employed to do so by the complainant, and testified to the value of the same on behalf of the complainant as its expert witnesses as to the value of the land in certiorari proceedings to review the assessment thereon of the Tax Commissioners. (See Sten. Min., pp. 2725, 2814.)

Seventh. The Master should state in his report that as shown by the testimony of the witnesses called by the City and the charts offered in evidence, increased consumption is the rule where there is reduction in the price of gas in the Borough of Manhattan, and that because of such rule and increased population the sales of the complainant company would be 15,300,000,000 cubic feet in the year 1907. (See Sten. Min., pp. 3073-6; City's Exhibit 57.)

Eighth. The testimony of Mayer, who appraised the plants for complainant, is that he spent 3,800 hours in viewing and appraising

the property, and 3,800 hours more in tabulating the result of such examination and appraisal, and that it was absolutely necessary to take that time even with all the data and special facilities he
437 had as expert for the company; whereas the experts for the defendant were at first denied any opportunity to inspect the plants and then only allowed a very limited and inadequate time in which to make such examination and appraisal. (See Sten. Min,. pp. 6600, 6670, 2273-6, 2472, 2419-20, 2466-9, 2406, 5244-50.)

Ninth. The testimony of Bradley, the chief engineer of the company, is that without a detailed and exhaustive examination of the plants and apparatus no proper appraisal could be made. (Sten. Min., p. 173.)

Tenth. The evidence in this case is, as appears from Sten. Min., p. 5505 *et seq.*, and complainant's exhibits 286 to 294, that the congested conditions of the sub-surface of the streets is largely due to the unnecessary duplication and quadruplication of gas mains due to the consolidation of the constituent companies of the Consolidated Gas Company already operating in the same territory at the time of the consolidation in 1884.

Eleventh. The evidence in this case shows that the consolidation of the constituent companies did not result in reduced cost of operation, but so far as oil is concerned, tended to and did increase the cost of the same because, as claimed by the company, of the great quantities required they could get it but from one company—the Standard Oil Company—and then at any price fixed by said company; so that the Gas Company is entirely at the mercy of the Oil Company (pp. 5938-62, 6072, 6075-81).

438 Block.	Lot.	Page.	Year.	Valuation admitted by complainant as excessive of what property would sell for under ordinary circumstances.		Reduction asked for.	Master's valuation.
991	1	2670	1904	$180,000 00		$156,250 00	$233,000 00
991	26	2673	1904	125,000 00		106,250 00	157,000 00
988	1	2669	1905	550,000 00	(with improvements)	400,000 00(a)	570,000 00
979	1	2660	1906	542,000 00	"	351,500 00	570,000 00
1090	23	2678	1905	53,000 00	"	46,000 00	72,000 00
1070	5	2675	1905	70,000 00	"	62,500 00	83,000 00
1089	1	2676	1906	800,000 00	"	525,000 00	1,150,000 00
1093	1	2681	1906	425,000 00	"	250,000 00	546,000 00

(a) Page 2670 admits land appraised after January 1, 1905, at $293,188, by skillful real estate experts.

PAGE BOUND VERTICAL IN BOOK

439 On page 98, Master's Report, the following statement appears:

"Accordingly, under advice of counsel, and assuming that sooner or later one-half of the real estate might be sold, in consequence of the removal to Astoria then contemplated, they made up the tax report on the basis of the full value of the land, plus the book value of one-half the plant, plus a few hundred thousand dollars to represent the possible scrap value of the other half of the plant in the event of sale. This resulted as follows:

One-half of plant ($15,755,462.88) to be retained indefinitely in New York, consisting of holders, etc., full book value	$7,877,731.44	
Add for value of the other half of plant, consisting of manufacturing plant, considered as scrap on removal	578,864.27	
	$8,456,595.71	
Land as per books	11,216,479.71	
Total as stated in report of June 30, 1901		$19,673,075.42"

In the above report the company gives the value of its own land as $11,216,479.71.

Master's Report, page 47: Astoria real estate is given as $1,132,558.28.

This Astoria property is stated to have been purchased for the purpose of the erection of a plant to replace the plants now on the island of Manhattan.

440 The 376 acres or more of land at Astoria are intended to contain all the future manufacturing apparatus and holders, with the exception of the holders in existence on the island of Manhattan.

We have therefore as a result the allowance to the Consolidated Gas Company of an exaggerated present value of real estate (land) plus the allowance of $100,000 for 1/12 of the land at present containing constructions at Astoria. No reduction is made for over one-half of the Manhattan real estate which will be available for sale when a removal of the manufacturing plant to Astoria is accomplished.

The Master has allowed the Consolidated Company the full present value of its real estate in use and in addition the value of land to be used to replace it in the ftture.

Master's Report, page 115:

"Whatever enhancement there may have been in its value since the date of purchase was the result of no efforts on the part of consumers of gas and they are not equitably entitled to a return thereon. Whether it was the result of mere good fortune or was due to the shrewdness and foresight of the management of the company is immaterial. In either case the justice of permitting the general public to share its benefits at the expense of complainant stockholders is not apparent."

Keeping the value of land at its cost price is not an "expense to stockholders."

While the statement quoted might be partially true with regard to an establishment or to a factory engaged in a competitive business and with the corrective control resulting from competition bearing upon its business, we submit it is not true in regard to a corporation dependent for the larger part of its business upon the free use of the streets of this city and dependent upon the increase of population due to other causes than its own exertions for the increasing use of
441 its gas. The Consolidated Gas Company is a monopoly and every improved pavement put down upon the streets is in effect a barrier created at the cost of the City (and not of the company) to protect it in its monopoly by rendering it more costly for a possible competitor to lay street mains.

There is no doubt of the legal right of the Consolidated Gas Company to sell its land to individual purchasers when it finds it convenient to do so at as high a price and as great a profit as it is able to obtain, but it is a positive injustice to claim that a monopoly should be allowed to capitalize against its public the increasing value of property, which increased value is entirely due to the efforts of the public.

Plants.

The plant as defined by the Master is as follows:

(*a*) Buildings and foundations of apparatus forming part of the manufacturing and distributing stations.

(*b*) Apparatus.

(*c*) Holders.

(*d*) General connections at the stations.

Referring to the Master's Report, page 28, and following, there is no doubt (p. 37) that the $15,532,489 more than covers the cost of the reproduction new of the six generating plants and the five holder stations.

The Master mistakes the testimony (p. 32 Master's Report.)

Quotation from Mr. Marks' statement:

"Neither as a rule did he (Marks) make allowance for piling or other expensive foundations."

See testimony, page 5251. Cross-examination Marks.

442 (Mr. MATHEWSON:)

"Q. You differed with him chiefly as to the amount of depreciation that should be allowed on first cost considering the present condition of the machinery.

"A. And also on the valuation of the buildings."

"Q. Then leaving the buildings out you would quarrel with Mr. Mayer's figures as to apparatus and contents and holders with reference to the amount for depreciation that should be allowed on the original cost.

"A. That is right."

Testimony, page 5256. Cross-examination; Marks.

Question by Mr. MATHEWSON: "Yes, and where does your foun-

dation of apparatus come in in this total? Did you include your foundation of apparatus in your total of buildings?

"A. In every case more than included; I was exceedingly liberal."

Testimony, page 5266, Marks' Cross-examination.

(By Mr. MATHEWSON:)

"Q. Did you allow for the piling in these foundations of these various works?

"A. In every building where I could learn (I accepted this on faith entirely), that piling had been used in the foundations I used 15 cents per cubic foot for the buildings in the place of 10 cents, which I would have used in the case of ordinary foundations."

Page 32, the further statement is made in Master's Report:

"Mr. Marks did not disagree materially with Mr. Mayer in his estimates as to apparatus and holders. They are due chiefly to the fact that Mr. Mayer included the cost of installation, whereas Mr. Marks estimated for what is known as sidewalk delivery of
443 the apparatus; other differences appear in cases where Mr. Marks has assumed a different weight of material."

The Master has entirely ignored the inventory of Thomas Rowland of the manufacturing apparatus, buildings and holders made in 1884. This inventory is introduced by the Complainants as Exhibit 70. At that time Mr. Thomas Rowland was actively engaged in building, and as the Exhibit states, did build a large portion of the apparatus and buildings and holders now remaining in use by the Consolidated Gas Company.

Mr. Rowland's intimate knowledge of the cost of construction and his close association with the six companies merged into the Consolidated Gas Company, gave him his information at first hand. In selecting these four examples, Mr. Marks was careful to identify the holders, the sheds and the buildings and satisfy himself that they had not been added to or extended.

Testimony, page 6680, Mr. Mayer computes the valuation of eight holders in his inventory of the Fourteenth Street Station at $586,044, and Rowland, in 1884, values these same holders at $508,800.

On page 6687, Testimony, Mr. Mayer gives his valuation of nine sheds at the Twenty-first Street Station at $725,652, and Rowland gives a valuation of these same sheds in 1884 at $246,349.

On page 6687, Mr. Mayer gives his valuation of brick and brownstone building inclosing two holders at Eighteenth Street Station as $179,151. Mr. Rowland, in Complainant's Exhibit 70, gives this same building at $45,250.

In the case of the Forty-second Street Station, Testimony, page 6693, Mr. Mayer values four gas holders there at $268,610, and Mr. Rowland, Complainant's Exhibit 70, page 242, gives the value of these same holders as $210,000.

444 *Recapitulation.*

	Mayer	*vs.* Rowland.
14th St. Sta. 8 holders	$586,044	$508,800
21st St. Sta. 9 sheds	725,652	246,349
18th St. Sta. brick holder bld	179,151	45,250
42d St. Sta. 4 gas holders	268,610	210,000
Mayer, 1906	$1,759,457	$1,010,399
Rowland, 1884	1,010,399	
	$749,058	

It will be seen at a glance that Mr. Mayer, after twenty-two years of use has valued these four items at 75 per cent. more than the valuation given in 1884 by Mr. Thomas Rowland.

It does not appear where the Master obtained his phrase "sidewalk delivery," or on what basis he permits the addition of 15½ per cent. by Mr. Mayer to an inventory.

Surely no one would take Rowland's figures for "sidewalk delivery" or set them aside in the figures of complainant's Exhibit 70, four items cleary identified for the figures of any engineer, even if he had built 1,000 instead of 100 complete gas plants, as he claims.

Master's Report, page 35.

"Mr. Marks did not regard the extent of depreciation actually existing, but assumed a theoretical deterioration of the supposed life of the plant."

Refer to Testimony, page 5063, Fourteenth Street Station; Forty-second Street Station; Forty-fourth Street Station; Twenty-first Street Station; Ninety-ninth Street Station; Eighteenth Street Station; Sixty-third Street Station; Sixty-fifth Street Station; One Hundred and Eleventh Street Station; One Hundred and Thirty-second Street Station and Inwood Station.

445 The careful re-examination of these inventories as clearly stated, shows that neither buildings nor water gas apparatus nor holders built within the last five years have been subjected to any depreciation whatsoever; but on the contrary have led their values as now allowed to the Consolidated Gas Company and prove that this statement of the Master is a pure assumption, made without proper examination of the testimony and the facts in the case.

Master's Report, page 110: It is not until the Master reaches the extraordinary allowance of 10c. per 1,000 cu. ft. of gas that he begins to take notice of the depreciation claimed by Mr. Marks. On that page he quotes as follows:

Columbus Ry. & Lt. Co.'s statement:

"A building may be kept in as good repair as possible and the cost of such repair can be ascertained and is ascertained and legitimately added to the operating expense. But in however good repair a building may be maintained, in adition to this cost there is a gradual depreciation of the value of the building itself arising from lapse of time in spite of fresh paint, new roof, new bracings, repaired joists,

etc.; which eventually according to circumstances renders the building useless for the purpose for which it was constructed. In the case of buildings this intangible depreciation is naturally slower than the depreciation of its contents in the shape of machinery, or the depreciation of wires, poles, conduits, and distributing system of a property such as complainant's.

"A machine may be kept constantly in repair so far as skill and ingenuity can keep it in repair, but in spite of such repairs the machine will wear out and become useless for its purpose. Machinery and appliances devoted to any purpose in which the state
446 of the art or the condition of manufacture have not been brought to absolute perfection so that there can be no further progress, is subject also, and always, to the fact that newer and better appliances either furnishing service or product at less cost, or furnishing service or product of better quality, or of more constant value to the consumer, may be at any time invented, thereby compelling the producer to cast off the old machinery and buy the new one, or to suffer loss of custom, or incur increased cost of product, by not so doing. For these reasons the machine to-day which is worth $10,000 may tomorrow, in the exercise of good judgment have to be sold for scrap.

"The pole line of an electric company may be constantly painted and watched with the utmost care, all that expense being charged to the operating expenses, but in addition to this there is necessarily a deterioration and decay of the pole from year to year that cannot be prevented by any such care."

Master's Report, page 98:

Book value of the plant (1904)	$15,755,462.88
Taxable value of plant (Bradley)	8,456,595.71
Difference	$7,298,867.17

This difference of $7,298,867.17 is the depreciation due to obsolescence and inadequacy predicted by Chief Engineer Bradley as a result of the necessity of removal in part to Astoria.

Testimony, page 6696, Mayer's Cross-examination: Mark's depreciation is given as $2,479,323.

Master's Report, page 37: Mayer's valuation of $15,500,000 is covered by this remark: "This may be fairly said to represent the cost of reproducing property as it stands. In this instance as
447 well as regards the three items to be considered, such reproductive cost affords the only practical basis of present valuation."

Chief Engineer Bradley did not find this so in 1901 when he announced the intention to sell one-half the Company's real estate in Manhattan, and scrap the manufacturing buildings.

Master's Report, page 31: The Master, referring to Mayer's estimate of apparatus, buildings and holders, states: "As hereafter pointed out, there were corroborated many particulars by the defendants' own witnesses and although subjected to careful examination by the latter and a full cross-examination by counsel no errors

became apparent which would materially affect the general result of his computations."

For the purpose of checking his own calculations (Testimony, page 6693), Marks pointed out a difference of $749,058 between Rowland in 1884 and Mayer in 1906 in four items only.

In Mr. Mayer's eyes these buildings, sheds and holders had increased three-quarters of a million dollars in value by twenty-two years of use.

Referring to City's Exhibit 87, page 1543, we find the total insurance carried by the Consolidated Gas Company on buildings and contents and holders to be $7,390,722. This is much nearer Mr. Bradley's valuation (Tax Report 1901) than to Mr. Mayer's, which is over twice that amount.

Gas Statistics in Other Cities.

Master's Report, page 93, complainant's assets compared with those in other cities: "Considerable stress was laid by some of the witnesses upon the gas statistics of other cities." "Such evidence cannot be regarded generally as of value because the variance in local condition is so great as to make accurate comparisons im-
448 possible." To any one familiar with the cost of construction in an engineering way there is no such mystery or variance as appears to have been imposed upon the Master in the cost of buildings and land. The prominent characteristic of the Island of Manhattan as a gas consumer is its enormous sales and the fact that every piece of apparatus in possession of the Consolidated Gas Company is and has been driven to its utmost limit and the only effect of this then will be to reduce the cost of structures per annual M. cu. ft. of sales far below the same cost in other cities. The difference in total cost of structures may amount to an increase of 10 or 15 per cent., and possibly 25 per cent., but the difference in sales of gas per capita between Manhattan and other cities is 100 *per cent. or more,* in favor of Manhattan.

It should be and is obvious that while it is necessary to use the annual sales in discussing operating expenses, it is equally necessary to use the true capacity of the works in comparing investment per annual M. cu. ft.

Referring to Montreal, $4.30 is given as Bemis' cost of construction. No reference is made to the capacity of the works or to the fact that Prof. Bemis' figures are fixed on sales and not on the capacity of the proposed new works or to the relatively larger cost of distribution in a thinly settled municipality.

Tax Reports.

Master's Report, pages 96 to 100: With apologetic remarks not flattering to the ethics of the company's officials or counsel and the statement that the inconsistent values of property and tax reports "have been recognized to a certain extent by courts," the Master sweeps aside the valuations given in the Tax Reports by the officials

of the Consolidated Gas Company, saying: "The figures given in the Tax Report are of no significance," although they reduce the Company's property by $12,801,000.

449 The evidence of the Chief Engineer, the Secretary and the Assistant Secretary shows misrepresentation of the values of the plants, the mains, the services and the meters and other properties against the evidence of other witnesses whose records are clean, whatever the Master's opinion may be of their relative abilities and experience.

Master's Report, pages 34 and 35: The Master makes the following statement regarding 10 per cent. undistributed expense and 5 per cent. interest, "but obviously they are a necessary part of any estimate of reproduction cost, as Mr. Marks admitted." The fact is that Mr. Marks distinctly stated that it was customary to add 10 per cent. and then 5 per cent. to estimates of works not yet built but not customary nor had Mr. Rowland (Complainant's Ex. 70) done so in making an inventory of existing works. (See Defendant's Brief, p. 116.)

Street Mains.

Master's Report, page 38: "It was shown by the complainant that mains of the aggregate value of $2,891,690.22, at Mr. Marks' prices, had in fact been laid by contract. A computation of the 15 per cent. contractor's profit suggested by Mr. Marks, would accordingly add $433,753.53 to his cost valuation. It was further shown that his estimates were based on an assumed mileage, very much less than actually exists."

In City's Brief, page 117, and City's Exhibit 91, 804 93/100 miles was found to very closely agree with 804 59/100 miles given by the company's books December 31, 1905.

Referring to City's brief page 117, and to Mr. Simpson's testimony, the statement is made: "This chart was misused by the omission in subtraction of 15% from contractor's prices as mentioned in note and besides that of adding 15% additional upon the prices containing contractor's profits."

450 Master's Report, page 39: The deductions made from the actual structural cost are, as appears from the record (p. 5108), in the nature of an allowance for obsolete mains, the grounds for which do not clearly appear."

Mr. Simpson in his testimony stated that nothing less than 8" mains were used, being laid to replace existing 2, 3, 4 and 5" mains. In using 6" mains to replace these inadequate small mains, a moderate sum, $1,037,018, was obtained as required for final renewals which ought to be made as rapidly as possible.

In allowing a replacement value on mains at $12,636,000 as against the cost on the books for $7,852,000 the Master has awarded the value of pavements $4,784,000 to the Consolidated Gas Company, although when pavements are laid, they are laid at a cost to the property holders of New York City, and at no cost to the Gas Company.

The valuation stated in the Tax Report for mains (Master's Report, p. 97) is $3,666,531.38.

House Services.

Master's Report, page 97: The taxable value for house services is given as $594,625.01 and the book value as $1,227,931.86.

In the testimony of complainant's witnesses, the value of the services is fixed at $1,994,000. If from this we substract the book value given above, we have an award of $766,068 to the company for pavements laid by The City of New York. It should be noted that the computations of Mr. Marks in all cases have not included any form of depreciation for either mains or services, he having stated that the depreciation of cast-iron mains is inappreciable and that the services having been enlarged and replaced recently, did not appear to be over-valued on the books of the Company.

451 *Pavements.*

When the City of New York paved over the existing mains of the Consolidated Gas Company (according to the graphic valuations given in the City's Exhibit 50 by Mr. Marks) it expended for pavements—

Over street mains	$4,784,000
Over house services	766,068
Making a total of	$5,550,068

The Consolidated Gas Company has paid nothing for this, but the Master has added it to the Company's possessions.

Master's Report, page 97: The officials of the Company in their valuation—

For the Tax report mains	$3,666,531.38
services	594,625.01
Total	$4,261,156.39

did not claim as much for the total valuation of mains and services as the Master has presented to them at the City's expense for the pavements over mains and services.

Meters and Miscellaneous Personal Property.

Master's Report, page 42: $4,100,000. City's Ex., 87: The meters and meter cocks as taken from the books of the Company amount to $3,261,687.42. The meters and all miscellaneous personal property are carried on the books of the Company at $3,802,544.50.

The Master, however, accepts the estimate of the Secretary of the

Company at $4,100,000, notwithstanding the fact that the same individual when valuing for a Tax Report (Master's Report, p. 97), had given this property in as $2,667,329.77.

452 *Working Capital, $3,616,000.*

In considering the working capital (Master's Report, p. 42) the Master has overlooked the $904,000 Consumers' deposits, and bases his figures on Mr. Carter's statements.

In addition to the $616,470.08 Supplies which he grants without commenting on same, he adds $1,000,000 cash to the nearly $1,000,000 already received as a forced loan from consumers.

The Consolidated Gas Company does a cash business, collecting its bills every 30 days, and it is not obliged to pay its bills for 30 days unless it elects to do so for the sake of discount.

For such a business as this the allowance of $2,000,000 accounts receivable is incomprehensible. It has no business to loan money unless it has a surplus which it cannot utilize in the prosecution of its business, and which should be divided amongst its stockholders.

Master's Report, page 43: "Mr. Marks testified that, in addition to fixed or structural assets, a certain amount of capital is required for operating the works. He did not give his own views as to the proper amount, but stated that it bore a certain relation to the annual sales of gas. He accordingly selected four Massachusetts companies, which he stated formed a group resembling very closely complainant's five stations in the island of Manhattan, and, on the basis of their actual annual sales, computed that the amount of capital actually necessary in their business was $0.13 per annual M. feet of gas sold. Multiplying this by the annual sales of the complainant for 1905, he obtained the sum of $1,726,811.32, as the proper amount of actual capital furnished or quick assets for the complainant company. It appears, however, from the reports of the Massachusetts Gas Commission that there are included as a part of the cap-
453 ital of the companies in question certain notes payable, which the witness had omitted in his computation. As corrected it appeared that the Massachusetts companies were employing about $0.48 per M. feet for their active capital, and, on a like basis, according to complainant's sales a proper working capital would be upwards of $6,000,000."

Dr. Humphries received from the Massachusetts Gas and Electric Light Commission a letter (Testimony, p. 6857) stating that these notes payable were considered as bonds and *part of the investment in the fixed structural assets;* this letter was presented for identification so that it appears that while those notes payable might be added to the fixed capitalization of the company, they in no wise affected the 13 cents per M. cubic feet of sales or the $1,726,811.32 active capital required by the Consolidated Gas Company.

If we add the $1,000,000 cash to the $616,470.08 we obtain $1,616,470.08 working capital as against $1,726,790 allowed by Mr. Marks.

National Coal and Coke Company, $50,000,000.

Master's Report, p. 44: This amount is added to the capitalization of the company for the purpose of economizing in the hauling of coke: "The proof indicates that such has been the result." "The profits resulting from the company's operations are paid to the complainant in the form of dividends." The Master overlooks the fact that the profits of hauling its own coke are charges to the cost of gas, having the result of increasing its apparent cost and these profits are credited to miscellaneous income with the result of increasing the apparent price of gas, which is an absurdity.

Astoria Plant, $12,000,000.

Master's Report, p. 44: It should be noted that the valuation of the Astoria plant does not include meters, services, mains
454 (with the exception of sixty-inch main, $620,000), miscellaneous material, working capital, or anything except one-twelfth of the real estate, gas manufacturing plant and one large holder.

It is a fact that no access was given to the defendants' representatives for the purpose of making an inventory during this trial nor has the Master made any reduction from the $12,000,000 (Master's Report, p. 98) to cover even any part of the $8,456,595.71 manufacturing apparatus to be abandoned in Manhattan or the further reduction of one-half of $11,216,479.71 real estate to be sold amounting to $5,600,000 more when Astoria gets into operation.

Master's Report, p. 48: "This investment is represented by its ownership of the entire capital stock of the Astoria Light, Heat and Power Company, together with its first mortgage bonds and promissory notes to the aggregate amount, as carried on its books, of $7,010,000. In addition to this it is a creditor of the Astoria Company for advances made in the course of construction, which are carried in open account. Thus we see the master has given to the Consolidated Gas Company an allowance of $15,500,000 for the manufacturing plant and holders and to this added another $12,000,000 for the Astoria Company, although it is clearly stated that the Astoria Company is to replace one-half the value of existing manufacturing plants.

In addition it would appear as though the Consolidated Gas Company had actually paid out only about $7,000,000, and in order to make up the $12,000,000 has been allowed an additional $5,000,000 *which it expected to pay* for the Astoria plant and that this whole valuation of $12,000,000 is an *ex parte* statement of a combined expenditure and proposed expenditure not yet made.

It appears to be the flimsiest pretext for an excessive allowance of capitalization possible to be conceived.

455 Master's Report, p. 49:

New Amsterdam Gas Co	$4,814,608 03
N. Y. Mut. Gas Lt. Co	5,703,290 65
Stand. Gas Lt. Co	14,587,495 23
	$25,105,393 91

The above total of $25,105,393.91 is given as investment in companies doing an independent business, in which the Consolidated Gas Company purchases something less than 3,000,000,000 feet of gas annually.

Master's Report, p. 52: "Mr. Marks concedes the propriety of an allowance for the cost of producing the gas purchased in 1905, and admitted that it made no difference whether the source of the gas so purchased was located in other Manhattan plants or in Astoria. He computed its value at $5,000,000 on the assumed cost of only $1.78 per 1,000 cubic feet of annual capacity, but this would appear to be inadequate." Had Mr. Marks assumed 3,000,000,000 cubic feet, the cost would have been nearer $5,400,000, and as the values of the Massachusetts companies were not contradicted on the basis of their own figures, we are still of the opinion that somewhere between $5,400,000 and $6,000,000 would be a fair allowance for the Astoria plant and holder if it is to be included and that from this should be deducted the amounts recouped by the sales of real estate and scrap plants abandoned on the Island of Manhattan (see Testimony, p. 2353).

The Astoria plant would appear to be a most extravagant undertaking if the figures given are real and not estimates. On page 36, Master's Report, he says: "For the purpose of determining present value, however, particularly on the basis of cost of reproduction, the method followed by Mr. Marks does not commend itself," and then the Master apparently forgets that the Astoria plant is to re-
456 place and reproduce the existing manufacturing plants.

Franchises and Good Will, $20,000,000.

Master's Report, p. 90: "Neither of the methods above suggested affords a satisfactory basis for any specific finding as to the value of the good will, considered apart from the question of franchises." "As I do not find it practicable to differentiate in figures the value of complainant's franchises and good will, I have concluded to consider all of the intangible assets together as a single item, the reasonable value of which, I think, may fairly be fixed at the sum of $20,000,000, or substantially the amount that would be reached by following the method adopted by the referee in the Queens County and Suburban Railroad case before referred to. Reduced to its ultimate effect, any value of a franchise and good will, possessed by a monopoly virtual or practical, depends upon its ability to extort more than a fair profit in fixing the price of what it sells.

Defendant City of New York's brief, p. 63: This shows that the franchise tax amounts to 3 13/100 cents per M. cubic feet. of sales,

and that this is charged into the cost of gas and collected from the consumers.

This, on the basis of defendant's valuation, means about 1½ per cent.

Six per cent. is allowed for interest in all cases in the State of New York, where a contract does not exist, and may be considered a fair profit. In the present case the New York State Gas and Electric Commission has fixed 8 per cent. as a profit and with the valuation of $64,000,000 the 3 13/100 cents amounts to 6/10 of 1 per cent. This 6/10 of 1 per cent., being allowed in the cost of gas, should be added to the 6 per cent. allowed to the company. Six and six-tenths per cent. of $64,000,000 is $4,224,000.

457 Deducting this from net earnings, $4,984,000 (Master's Report, p. 140) (error in Master's Report, p. 81, given as $4,588,000), we have a balance of $760,000, which, capitalized at 7 per cent., means about $10,800,000 under the assumptions of the Master, instead of the $20,000,000 which he allows. The New York State Gas and Electric Commission did not allow anything for franchises for the very good reason that they were the gift of the people and should not be capitalized against them.

As for good will, there can be no such thing as good will in case of monopoly.

Good will can be obtained in a competitive business by superior service and ability; but referring to "Depreciation of Factories" by Ewing Matheson (Master's Report, p. 90) this author says on p. 41 of his work, referring to factories engaged in competitive trades, "The very fact that good will is seldom appraised at more than 1 to 3 years' purchase shows that it is considered to have a doubtful and fleeting value."

Has the Master continued his reading he would have found the depreciation of brick buildings with iron work due to obsolescence and inadequacy at 1¼ per cent. annually, instead of .85 of 1 per cent. And further, on p. 17, this statement, "Gas undertakings afford useful examples in the principles of depreciation."

Were the Master's methods of reasoning correct and just, the greater the prosperity of the community the greater the improvement of the streets and values of real estate, the higher would the capitalization of a gas company be raised, for he sees but one thing, the present reproductive value new of the plant in this problem.

And the greater the capitalization of a company becomes the higher would the price of gas become in order to meet in-

458 creased profits demanded at specific rates, and the higher the price of gas is raised or held above a fair profit the greater will become the value of the free gift of franchises and good will because of the power of extortion conferred by this gift. The Master's reasoning is tortuous and in defiance of the recognized laws of business and of nature.

No. 53, Street Lamps, 2.18c. is omitted as a reduction from the cost of gas although this covers only repairs and caring for lamps and is covered by a contract for which the Consolidated Gas Company is

the sole bidder and 2.18 cents per M. does not include the cost of gas furnished to street lamps.

No. 54, Interest on Consumers' Deposits, is excluded. It amounts to 39/100c. per M. cu. ft.

Nos. 58, 61, 62 are omitted as a reduction.

No. 66, Taxes, is partially omitted as a reduction.

No. 67, an arbitrary charge of 10c. per M. cu. ft. of gas sold is added for the purpose "of any minor extensions, renewals on account of extraordinary wear and tear, depreciation not covered by repairs of supersession, accidents of larger moment than usual, fluctuations in the business, changes in cost of all materials and electrolysis and other contingencies." It is difficult to account for the amazing admission of 10c. per M. cu. ft. Certainly it was not shown that the Consolidated Gas Company or any other company in any country where gas companies are regulated by law, have been allowed to charge to the cost of gas anything more than the actually proved expenditures. In discussing the cost of repairs, amounting to 10 and a fraction cents per M. cu. ft., in some cases the Master has confused the repairs already charged to the cost of gas with the contingencies.

The Master refers (Master's Report, p. 113) to the depreciation of 5 per cent. on electric lighting plants.

459 Master's Report, p. 116, he states: "In a work written by the witness (Marks), entitled 'Finances of Gas and Electric Light and Power Enterprises,' he advocates 15 per cent. on the structural value of gas property to cover return on capital and a fund for future contingencies."

Marks' calculation (Defendant's brief, p. 121) of the original structural cost of the Manhattan works complete is $201; 15 per cent. of this is 30c.

(Master's Report, p. 123:) Taking the total cost of gas as presented in Complainant's Ex. 94 at 74 81-100c. the Master finds a total reduction of 8 97-100c. which he subtracts, leaving a net total cost of gas at consumers' meter of 65 84-100c. per M. cu. ft. of sales.

Of this deducted 8 97-100c., 7 32-100c. is a fixed charge never claimed by either complainant or defendant as chargeable to the cost of gas. As a matter of fact the Master has deducted from the cost of gas claimed by complainant 1 65-100c. only and has produced a cost of gas which exceeds any heretofore allowed in previous investigations.

Testimony, page 5014: "Secretary of the New York State Gas and Electric Commission give[s] an average price for oil 3 27-100c." Apparently entirely ignoring the well-known rules of trade, the Master finds no objection to the payment of 4 5-8c. per gallon for oil in the vast quantities stated to be required in New York City (Master's Report, p. 127) and he has no criticism for the excessive illumination clearly proving waste of oil.

(Master's Report, p. 140:) Referring to the net profit of $2,327,328.31 fixed by the Master and to his subsequent calculations, it is easy to see that on the valuation of $31,000,000 present value, the profit would be in the neighborhood of 7 per cent. and on the true

cost of gas manufactured in Manhattan (52½c. per M. in the Consolidated Gas Company) would be over 21 per cent.

460 Referring to the statements contained in the report regarding the testimony of Dr. Marks, the following corrections should be made:

Correction to Master's Report, No. 1.

(Master's Report, p. 35:) "In this view he made estimates on the theory that the cost of final replacements to cover such an inadequacy or obsolescence ranging from 25 to 60 per cent. and based on the supposed life of 120 years for the plant." (Defendants' Brief, p. 113; Testimony, p. 6696.)

Substitute: "In this view he made estimates on the theory of the cost of final replacements to cover such an inadequacy or obsolescence would be about 21 per cent. for the average of buildings, gas meter apparatus, yard connections and holders."

Correction to Master's Report, No. 2.

(Master's Report, p. 36:) "The fact thus being that the plants are in good order and operating efficiently it does not appear reasonable for the purposes of this case to charge them with a theoretical deficiency so great as if actually existing would make their successful operation a practicable impossibility." Please eliminate this as incorrect and not in accordance with the facts.

Correction to Master's Report, No. 4.

(Master's Report, p. 32:) "Mr. Marks did not disagree materially with Mr. Mayer in his estimates as to apparatus and holders. They are due chiefly to the fact that Mr. Mayer included the cost of installation whereas Mr. Marks estimated what is known as 'sidewalk delivery' of the apparatus. Other differences appear in the cases where Mr. Marks has assumed a different weight of material." Refer to Complainants' Ex. 70.

Test—6680, 6687, 6693, Defendants' Brief pp. 113, 115, 115 Recapitulation.

461 Please eliminate above statement as not in accordance with the facts.

Correction to Master's Report, No. 5.

(Master's Report p. 35:) "Mr. Marks did not regard the extent of depreciation actually existing but assumed a theoretical deterioration of the supposed life of the plant."

Refer to Testimony p. 5063, and following giving inventories of all stations of Consolidated Gas Company in Manhattan.

These inventories show that neither buildings nor water gas apparatus nor holders built within the last five years have been subjected

to any depreciation whatsoever. Please eliminate as not in accordance with the facts and the testimony.

Correction to Master's Report, No. 6.

(Master's Report, p. 31:) "As hereafter pointed out there were corroborated many parts by the defendants own witnesses and although subjected to careful examination by the latter and a full cross-examination by counsel, no errors became apparent which would materially effect the general result of his computations."

Refer to testimony, p. 6687, Defendants' Brief, pp. 115, 116, showing error of $749,000 in four items and objecting to the addition of 10 per cent. and 5 per cent. to inventories.

Please eliminate as not in accordance with the facts and testimony and exhibits.

Correction to Master's Report, No. 7.

(Master's Report, p. 93:) "Considerable stress was laid by some of the witnesses upon the gas statistics of other cities. Such
462 evidence cannot be regarded generally as of value because the variance in local conditions is so great as to make accurate comparisons impossible."

Refer to testimony pp. 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, Defendants' Brief pp. 110, 111.

The difference in cost of structures may amount to an increase of 10 to 25 per cent. but the difference in sales of gas per capita between Manhattan and other cities is 100 per cent. or more in favor of Manhattan. The valuation of Boston Gas Works was fixed by an inexpert legislature. The valuation of Philadelphia Gas Works is based on a mere suggestion and is not testimony.

Please eliminate as not in accordance with the facts or the testimony.

Correction to Master's Report, No. 8.

(Master's Report, pp. 34-35:) "But obviously they are a necessary part of any estimate of reproduction cost, as Mr. Marks admitted."

See Defendants' Brief, p. 116.

See City's Exhibits 125 to 135 inclusive.

Please eliminate as not in accordance with the facts and the testimony.

Correction to Master's Report, No. 9.

(Master's Report, p. 38:) "It was shown by the complainant that mains of the aggregate value of $2,891,690.22, at Mr. Marks' prices, had in fact been laid by contract.

"A computation of the 15 per cent. contractors' profit suggested by Mr. Marks would accordingly add $433,753.53 to his cost valuation."

463 "It was further shown that his estimates were bases on an assumed mileage very much less than actually existing."

An assistant to Mr. Marks, after measuring five maps, failed to include them. The Master did not permit this testimony to be corrected when offered, but made use of corrected figures in Defendants' Brief, p. 118.

Mr. Simpson's testimony, p. 5454 and 5455 made use of contractors' prices which includes 15 per cent. on the cost in City's Ex. 50 and then added an additional 15 per cent. to obtain $433,753.53.

Refer to Defendants' Brief, p. 117.

Please eliminate as not in accordance with the facts and the statements in Defendants' Brief.

Correction to Master's Report, No. 10.

(Master's Report, p. 43:) "It appears however from the reports of the Massachusetts Gas Commission that there are included as part of the capital of the companies in question certain notes payable which the witnesses had omitted in his computation. As corrected it appeared that the Massachusetts Gas Companies were employing about 48c. per M. cubic feet for their active capital and on a like basis according to complainant's sales a proper working capital would be upwards of $6,000,000."

Dr. Humphries received from the Massachusetts Gas and Electric Light Commission a letter stating that these notes payable were considered as bonds because they were used for the structural assets and considered a part of the fixed capital sunk in construction.

Therefore these notes payable in no wise affect the liquid assets of the companies leaving 13c. per M. cubic feet of sales as correct for this purpose.

464 Please eliminate as not in accordance with the facts or the letter from the Massachusetts Gas and Electric Light Commission. (Testimony p. 6857).

Correction to Master's Report, No. 11.

(Master's Report, p. 52:) "He computed its value at $5,000,000 on the assumed cost of only $1.78 per M. c*y*. ft. of annual capacity, but this would appear to be inadequate."

Refer to Defendants' Brief, p. 111, and to testimony pp. 2348 to 2358. The $1.78 is deduced from the official figures of the four Massachusetts companies and is not "assumed." No proof from these companies or their representatives of the incorrectness of $1.78 has been adduced proving the incorrectness of $1.78.

Please eliminate as not in accordance with the testimony and the facts.

Correction to Master's Report, No. 12.

(Master's Report, p. 36:) "For the purpose of determining present value, however, particularly on the basis of the cost of repro-

duction, the method followed by Mr. Marks does not commend itself."

The Master has forgotten that the Astoria plant is to replace and reproduce the existing plants which should be deducted from its cost as abandoned and sold.

Please eliminate as not in accordance with the facts and the statements of the Complainant's witnesses.

Correction to Master's Report, No. 13.

(Master's Report, p. 90:) "The reasonable value of which I think may be fairly fixed at the sum of $20,000,000."

As the franchise is a gift of the public costing the company nothing and as the franchise tax is charged to the cost of gas
465 and costs nothing to collect, the consequence is the Consolidated Gas Company has expended nothing and invested nothing for a franchise.

The alleged franchises have no value on which a return should be charged against the gas consumer and the Report should so state.

Correction to Master's Report, No. 14.

(Master's Report, p. 113:) "Depreciation of 5% on electric lighting plants."

Please eliminate as having no proper relation to the depreciation of Gas Works.

Correction to Master's Report, No. 15.

(Master's Report, p. 116:) "9 cents per M. cu. ft."

Please eliminate as further reading of "Finances of Gas, Electric Light and Power Enterprises" shows this arbitrary statement to be qualified.

Correction to Master's Report, No. 16.

(Master's Report, p. 140:) Apparent price of gas obtained, $1,034. True price of gas, $.998. Difference, 3.6 cents.

(Master's Report, p. 123:)

Apparent cost of gas	65 84-100c.
Less	3 6-100c.
True cost of gas	62 24-100c.

This is the corrected cost of gas according to the Master's method if there is subtracted the amount by which the apparent price of gas exceeds the true price of gas making all allowances in the cost of gas claimed by the Master.

466 *Appraisal.*

As regards buildings:

(*a*) In regard to the method of Mr. Meyer for ascertaining the value of buildings, that is, by cubic foot contents, multiplied by an assumed factor; this is well known to be an incorrect and uncertain method, even when used with all the precautions possible. It is only approximate at the best (Meyer's testimony, p. 1401) and is not used by Mr. Meyer when making a bid. It is merely a rule of thumb method of getting an approximate estimate.

An example of the crudity of the method in Mr. Meyer's hands, is notably shown in the case of the Twenty-first street sheds, where the same factor of cost is applied whether the sheds have party walls or end walls; where the buildings have slate roofs or tar roofs or no roof; whether it has double floors or no floor; one uniform cubic foot factor answers the purpose. The instance of these sheds is a notable one, but there are many others equally erroneous in results. A still more flagrant case of error from the use and abuse of the cubic foot factor is shown in the Fourteenth Street Retort House, where there are three roofs supported on columns, equivalent to party walls, where there is but one end wall and where the side walls are *separately appraised* as a brick wall. In claiming to back up the sufficiency of the cubic foot factor, Mr. Meyer has made use of the method of quantities and units of cost. Mr. Edgerton's estimate was upon quantities, based upon Mr. Meyer's schedule. There were no omissions; Mr. Meyer's Schedule of "Edgerton's omissions" (Complainants' Ex. 372) was found to be erroneous. On sufficiently careful inspection, it will be found that the printer made the correction of an error of the typewriter at page 5399 of $72,438, but failed to deduct it from the totals, which is therefore that amount too great.

467 At pages 6733 to 6739 a discussion arose as to the admission of the detail sheets and estimates of Mr. Edgerton. These had been in the possession of the Gas Company for several weeks, in order that they might be examined for errors or omissions. Mr. Meyer testified that although he had not time to go over them (p. 6734) "the time was too short, but in the time I did examine them I found they were so full of errors and omissions that I took it for granted that they were all on the same basis and of no value."

No omissions or errors have been pointed out save in the case of One Hundred and Thirty-second street building and Twenty-first street.

In the case of One Hundred and Thirty-second street a clerical error occurs in calculating the brick work at $14 per thousand in place of $21, as Mr. Edgerton testified it should be.

In the case of Twenty-first street, Mr. Meyer was in error; the excavation item was not short as claimed by him, but was included in the item foundations for machinery. Twenty-five thousand dollars was allowed for foundations, including excavations, as shown on the detail sheets. (See p. 6579.)

NOTE.—On pages 5385 and 6738 there was a discussion as to Mr. Edgerton's memoranda, which the Master directed should be marked for identification, although he refused to admit them as evidence. Such memoranda were never given any designation by the stenographer, as will appear from an examination of the various days' records immediately preceding p. 5385. Such pages show the State's last exhibit as O. O. O., which, according to the index, was the last exhibit introduced by the State.

It is requested that they be given the designation of State's Exhibits P. P. P. for identification, being detailed estimates for buildings and holder tanks of complainant.

468 References to Mr. Edgerton's factor for cost of brickwork laid, are in pages 5370 to 5383, at $21 per thousand. In his summary of cost at from $14 to $21, according to class of work. These prices were obtained from the most responsible contracting firms in the city.

In no case was an estimate for pile foundations omitted where called for in Mr. Meyer's schedule. Mr. Edgerton did not agree with Mr. Meyer's "market prices" for the simple reason that Mr. Meyer's prices were not those of December, 1906.

Any difference between Mr. Meyer and Mr. Edgerton must be due to the difference in methods of arriving at weights, for the same cost factors were employed.

Pressure.

On Page 142 of the report the Master computes the variations of pressure for Consolidated Gas Company to be 1/10 inch for 17 feet difference of level. There is no basis for such computation in the testimony or exhibits. A variation of 1/10 of an inch for 22 feet difference of level is the correct amount as shown by State's diagrams of pressure at Columbia College compared with those at the printing office at One Hundred and Twenty-fifth street—a difference of level of 250 feet therefore would account for but 1.14 inch variation while the law allows 1.50 inch.

The estimated cost of a pressure regulating system was made by Mr. Simpson of the Consolidated Company. It is to be noted that the cost of piping as assumed by him was at four times the cost of the large mains already laid.

It will be noticed that the gain of pressure of 1/10 inch for each 17 feet elevation, assumed by the Master as due to the levity of consolidated gas, would require 15 to 17, or 255 feet extreme difference of level in order to exhaust the margin of 1.5 inch allowed

469 by the statute as the extreme allowable difference of pressure from a maximum of 2.5 inch to a minimum of 1 inch.

It follows that the requirement of the law in regard to pressure is not opposed to the laws of gravitation as stated by Bradley, but on the contrary, the violations of the law are due to the undue forcing of gas through the pipe system of the Consolidated Gas Company by means of pumps and unduly heavy holder pressure, as shown by Complainant's Exhibits.

Report, page 10.

Mr. Edgerton's valuation included the offices and stables, except Irving place and Hester street.

The Consolidated appraisal included all offices and stable in the real estate, according to this statement the offices and stables have been included twice.

In regard to estimates of Mr. Meyer and Mr. Edgerton on apparatus the former continued his method of "estimate by comparison" with apparatus of similar size as constructed by Bartlett, Hayward & Co., at Baltimore, while Mr. Edgerton based his upon measurements and calculated weights of the apparatus in position.

Mr. Meyer accepted the one party bids for the Lowe apparatus in the various works, made by the United Gas Improvement Company, although several manufacturers erect Lowe apparatus, in competition, the patents having expired.

Mr. Edgerton estimated on the apparatus by quantities and units of cost which would fully cover such construction.

Corrections of the Master's Statements Regarding the Testimony of Prof. Bemis.

(1) On page 94 of the draft report it is stated that Prof.
470 Bemis testified to a capital of $4.26 per 1,000 feet for the Boston Gas Company, but the Master remarks: "The present value of such assets was appraised at the time of consolidation and is set forth in the published report of the Massachusetts Gas Commission produced by one of defendant's witnesses. It approximates $23,000,000 or nearly $8 per 1,000 feet."

On the other hand, Prof. Bemis testified on the subject as follows (page 3376): "An appraisal was brought in which was disputed and never came to a final issue. * * * Hardly any deduction was made for depreciation or duplication or because the mains were duplicated." As a matter of fact, the $23,000,000 merely represented a preliminary claim of the gas company before the State Commission. The claim was vigorously disputed by the other side, the City of Boston, but before the latter had completed presentation of its case the Legislature fixed on a capitalization substantially equivalent to the sum total of the existing stocks and bonds.

In the same state report of the Massachusetts Gas Commission referred to by the Master (Twenty-first Annual Report for year ending June 30, 1905, p. 125), the mains of this Boston Company are given as 806 miles or more than those in use of the Consolidated, although the sales were only about one-fourth as great.

(2) On page 95 of the Report, the testimony Bemis gave in Chicago is quoted, that the People's plant of that city could be duplicated for $3.20 per 1,000 feet, or about $35,000,000, and then Mr. Cowdrey is quoted as saying: "It would not be possible to replace the company here in Chicago with its first class property and its business for less than $5.00 per 1,000 feet of annual output. I would consider it a physical impossibility to replace the plant and business of the People's Company for $35,000,000." Observe that

Mr. Cowdrey included the *business* which Mr. Bemis did not
471 for all the cost of soliciting and canvassing for new business are charged to operating expenses by all gas companies and paid for by the consumer and not by the stockholder.

With respect to Prof. Bemis' estimate of $3.20 at Chicago, he testified (p. 3377):

"I think I spoke of a new plant as $3.20 per 1,000 feet.

Q. That was for water gas, was it not?

A. Yes, but they had twice as many mains—I had to allow for twice as many mains as in New York."

The testimony of Prof. Bemis and Mr. Cowdrey with respect to Chicago was based upon a manufacturing plant of adequate capacity, while it is a matter of record that the Consolidated Gas Company for several years has been buying from other companies from 20 to 25 per cent. of the gas which it sells, and therefore would not require, for that reason alone, as large a capital as Chicago.

Further, with respect to the distribution system in Chicago, Prof. Bemis testified (p. 3210), that "the mileage of the People's Gas Company in Chicago was 2,000 miles and their sales 11,000,000,000 feet.

The Master ignores the fact that Prof. Bemis' estimate of Chicago was for a new plant with only one-third the sales of gas per 1,000 feet which are enjoyed by the New York company. Upon this point Prof. Bemis testified (p. 3538):

"I think I spoke of a new plant as $3.20 per 1,000 feet * * * The difference in the mains in the two cities will account for almost the entire difference. There are, if I remember rightly, about 795 miles, or call it 800 miles, in use in New York, and 2,000 miles in use in Chicago; in other words, 150 per cent. more in
472 Chicago; you take the book value even of the mains here in New York, which is, I think, in the neighborhood of $7,600,000, I don't recall exactly at the moment, but about this, and 150 per cent. of that is $11,400,000, and that alone divided into the 13,300,000,000 feet of sales would make 90 cents of capitalization per thousand feet, or account for almost the entire difference; then again, I was considering in the case of Chicago a plant that was buying its land more recently, while in New York I was considering the land as bought many years ago."

The Master ignores the fact that the Chicago, like the Boston company, voluntarily reduced its price to 85 cents early in 1906 for the same quality of gas in Chicago as in New York. He tries to break its force by stating (p. 131):

"It appears, however, without dispute that coal is materially cheaper and residuals are higher in all the lake cities than in New York City."

On the contrary it was disputed by Prof. Bemis that coal was materially cheaper in Chicago. Notice his testimony (pp. 3233-4):

"I think gas coal in Chicago may be quite as expensive as in New York * * * In making water gas they use anthracite coal and coke * * * I never got absolute data, but the anthracite coal

goes further * * * In making water gas they use anthracite coal and coke."

As for residuals there are none whatever produced in Chicago, except a little water gas tar for the gas there is all water gas. This, also was brought out in the testimony (p. 3234).

(3) With respect to Montreal, the Master states (Report, p. 9516), in a recent estimate for the City of Montreal:

473 "Prof. Bemis fixed for the construction of a plant $4.30 per 1,000 feet of capacity, although there labor is high, land less expensive, there is practically no rock, the city has only 33 miles of permanent paved streets to 160 miles of macadam, etc. * * * As elsewhere shown, a gas company can be run at its full capacity and should have a reserve of at least 20 per cent. beyond its sales; no allowance appears to have been made for this in the Montreal estimate of $4.30."

On the contrary, Bemis stestified (pp. 3539-40, 3637) (1). That he estimated 300 miles of mains for a billion feet of sales, or nearly a third as many mains as in New York with thirteen times as great a business; (2) that "25 miles will be laid in rock." This is as large a ratio as is laid in rock in New York; (3) the mains in Montreal were to be buried 6 feet deep, or twice as deep as in New York. This would involve three times as much cost for laying as at the New York depth, other things being equal, although the latter point of the exact amount of increased cost was not directly stated; (4) it was testified that the unit figures used in Montreal when applied to New York would give a cost of only $1.70 per 1,000 feet of sales, but that the larger average size in New York for these mains would increase this, so that there was no contradiction between the estimate of Professor Bemis of about $2.20 in New York and the Montreal estimate. (5) There is no authority whatever for the Master's assertion that the capacity was not ample in Montreal. On the other hand, the capacity in proportion to the yearly sales was a third larger than in the case of the Consolidated Gas Company plans outside of Astoria.

The Master's Report, p. 95, quotes Professor Bemis as stating that the value of the properties of the Baltimore Gas Company "including, it may be assumed, franchise and good will, should

474 be computed at twenty times the net profits of the company from its gas business, and that this was a conservative method of computing the value of gas properties."

The Master omits to state that Professor Bemis explained at some length (pp. 3384-6 and elsewhere) that this was their value for purposes of taxation while they were permitted to charge the existing price and make existing profits. He testified (page 3384): "The company in Baltimore had no inalienable right to continue to earn on that, but as long as it was earning on that basis, the City had the right to tax it on that basis."

The Master on pages 129-30 dismissed all the evidence of excessive costs of manufacture of coal gas that were deduced from comparison with the Central Union Company, but he utterly fails to take up the evidence brought together on pages 188-9 of the brief of The City

of New York showing, first, that the labor cost of coal gas for the Central Union is 3.69 cents per 1,000 feet less than in the coal gas plants of the Consolidated, and, second, that the amount of coke produced for sale by the Central Union is 30 per cent. greater per 1,000 feet of gas made, or equal to 3.48 cents per 1,000 feet, even at the price of coke per bushel or per ton obtained by the Consolidated. He ignores the fact that these two items aggregating 7.17 cents per 1,000 feet are due to the superior plant of the Central Union and not at all due to the market for coke or to the candle power.

The Master on page 113 states that in Massachusetts "the percentage of intangible depreciation has been definitely fixed by statute so far as municipal electric lighting companies are concerned, at 5 per cent., annually, upon the total cost of the plant." On the contrary, the statute is quoted verbatim in the testimony by professor Bemis (page 3239) to the effect that the depreciation shall be "equal to 3 per cent. of the cost of the plant exclusive of land and
475 any water power appurtenant thereto or such smaller or larger amount as the Board of Gas and Electric Light Commissioners may approve."

The Master in his treatment of depreciation, contingent fund, etc., refers (page 109) to the only depreciation brought out by the company, $604,988. This divided over the 164,000,000,000 feet of the last twenty-one years would only be 0.37 cents per 1,000 feet of sales. The Master claims more for the company than it asks for itself. He also ignores all the evidence on depreciation and reserve funds, and all the deductions and computations therefrom made by The City of New York in its brief (pages 166-91 and elsewhere, including 130-7, 295-6, 300-1).

On page 115 the Master justified the capitalization of the increased value of the land, which he says was "the result of mere good fortune or was due to the shrewdness and foresight" of the company. He ignores the fact that such capitalization of increased land value and also of franchises and paving is not allowed in fixing the price of gas in either Massachusetts or Great Britain. (Testimony pages 3024-3068 and brief of City, p. 227-37 and 299-303). He is also more appreciative of the company than it is of itself. The company stated that the increase in the value was due to "Divine Providence and the growth of The City of New York, p. 3819." The Master leaves out both elements and ascribes it to "good fortune" and "shrewdness" of the company. Mr. Humphreys testified the last day of the hearings that the land is not worth any more for gas-making purposes to-day than when it was purchased (page 6825).

On page 129 the Master, referring to candle-power, absolutely ignores the testimony that in Philadelphia the United Gas Improvement Company is able on cheap Texas oil to maintain a candle-power at the testing stations every day in the year within three-
476 fourths of a candle-power of that given at the consumer's meter. A margin of two to three candles is not necessary as maintained by the Consolidated Gas Company. (Testimony, pp. 6902-5. See paper on Candle-Power in Philadelphia, by Gartley.)

With respect to the capitalization of gas companies throughout the United States of $8.47, referred to by the Master (p. 96), Mr. Humphreys admitted that this figure was probably somewhat more than the structural value (page 6877).

Professor Bemis testified (page 3541) that the Massachusetts companies average less than 70,000,000 feet of annual sales, which was less than the average sales in the rest of the United States, and, furthermore, he testified that the cost of laying mains was greater in Massachusetts than on the average elsewhere because mains had to be laid deeper in Massachusetts on account of the frost.

The master also ignores the evidence summarized in the Brief of The City of New York (295, 296 and testimony of Professor Bemis, pages 3024, 3068), that the capitalization of paving and growth in the value of land is not allowed in either Massachusetts or Great Britain.

The Master's dismissal (page 123) in one sentence of the elaborate report of Messrs. Marwick and Mitchell because "it requires adjustment in considerable detail of various differences due to questions of bookkeeping" in order to make it "of any value for purposes of comparison," is fully answered in the Brief of The City of New York (pages 145, 160, 185-7).

The Master has also ignored the elaborate summary of the evidence on oil in the brief of The City of New York (pages 192, 203), where it is shown among other things with quotations of the exact page of evidence, first, that the company admits that with its Astoria plant making coal gas it will need half as much oil per 1,000 feet as with water gas; and, second, that cheap Texas oil is used ex-
477 clusively by two companies—Philadelphia and Newark—to a larger extent than all the expensive oil bought by the Consolidated plants of New York City, yet the candle-power made with this oil in Philadelphia must be the same—22 candle-power—at the testing stations, as is required in New York.

Franchises.

On page 52 of the report, second line of section headed "Franchises," add after the word "was" the words "attempted to be."

Change the second paragraph on page 53 so as to read "additional stock of the new company was issued for franchises and rights to the extent of $7,781,000," and an item franchises and rights $7,781,000 is still carried on the books of the company. This stock was apportioned between the constituent companies as follows," etc.

Page 61, line 1, after the word "the" at the commencement of the line, add "consents." After the word "licenses" add the words "estimated to be."

Strike out the paragraph marked 3 as the statute referred to, chapter 367, Laws of 1884, does not apply to the complainant.

In the paragraph marked 2, under the statement "it is claimed by the defendants" after the word "although" in line 7, strike out "by its terms unlimited as to time necessarily expired with the termination of" and add instead thereof the words "the limit of its term is

not expressly stated therein and could not survive the company's corporate existence," and add at the end of said paragraph 2 the words "and therefore had no power to use the streets of the municipality, even though the latter may attempt to consent to such use," and on the last line after the word "was" insert the words "alleged to have been."

After the word return on line 10 add the words "as against the consumer."

478 On page 63 there is no evidence to support the statement in the second paragraph reading "in short, so far as the present record shows, the municipal authorities have fully acquiesced in the continued use and occupation of the streets by complainant."

It is respectfully submitted that the objection made by the City that there is an entire absence of proof that the grantees under this Act of 1871 met and selected an executive committee was not technical.

On page 64 there is no evidence of any extension of the consent to the Harlem Company referred to on this page.

On page 66 there is no reason stated for the conclusion expressed "although this statute is claimed to be unconstitutional its validity must be assumed for the purposes of the present proceeding.

On page 67 the words "unlimited as to time" on lines 4 and 5 should be stricken out and the words "not specified in the consent itself" inserted instead thereof.

Besides the foregoing a general objection is urged that the Master's statements are, as a rule, too broad, and frequently in stating that no proof exists, impose upon the defendant the burden of proving a negative.

It should be stated in the report that although complainant's officers were examined as to the terms and conditions under which the Consolidated Gas Company was receiving gas from the Astoria Light, Heat and Power Company, they were unable to do so stating no arrangement had been made as yet.

In view of the fact that requests to find have been submitted by the complainant and by the State although it was understood no requested findings would be required by the Master prior to the coming in of the report, the defendant, The City of New York, asks

479 leave to adopt and present on its behalf the requests and special findings heretofore presented in behalf of the State.

WILLIAM B. ELLISON,
Corporation Counsel, Solicitor for City of New York.

WILLIAM P. BURR,
Of Counsel.

Additional Objections to Master's Report.

At page 37 of Report, the Master allows the round figure $15,500,00 for the manufacturing plant and holder stations, the capacity of which is 51,000,000 daily. Of this capacity 38,000,000 daily is due to the water gas stations at Forty-fourth, Seventy-first and Ninety-ninth streets. The maximum allowance as to cost of the

various water gas plants, per 1,000 daily capacity is stated by Mr. Meyer at $125, and for storage or holder capacity $80.75 per 1,000 cu. ft. contents, as appraised by Mr. Meyer at One Hundred and Thirty-second street and One Hundred and Eleventh street. (Sten. Min., pp. 1568, 1389, 1391. See also Sten. Min., pp. 1567, 1370, 1380, 1389, 1391.)

All of the 3,000,000,000 of gas bought from other companies was water gas, and the average delivery for 200 days was equal to 15,000,000 a day. The capital required to make and store this gas is, according to complainant's testimony 205.75 per thousand daily capacity. (Sten. Min., pp. 1389, 1391, 1568.)

On this basis, capital required for making and storing 15,000,000 cu. ft. would be.....	$3,086,000
Real estate required on the basis of water gas.....	750,000
	$3,836,000

480 instead of $12,000,000 as allowed by the Master for property of other companies devoted to use of complainant—Error of Master's findings on this item, 8,164,000 which should be deducted from the sum total.

Also on this account, should be deducted the 10 per cent. profit allowed other companies on the labor and material used, to make complainant's gas.

On page 63 the Master says:

"In short, so far as the present record shows, the municipal authorities have fully acquiesced in the continued use and occupation of the streets by complainant."

The Master is respectfully referred to the third, separate and distinct defense in the answer of the defendant The City of New York, on page 14 thereof.

With regard to the proportion of occupied and unoccupied land to the output and storage of gas, this defendant desires to submit a tabulation based on the record in evidence, which, as it requires considerable calculation, it has not yet been able to complete, and which defendant The City of New York deems necessary to clearly show that complainant is the owner of, and places capitalization on a far greater amount of land than is actually necessary for the production and storage of its gas.

The defendant The City of New York, to preserve its rights, respectfully protests against the refusal of the Master to allow additional time for submission of proposed changes and corrections to the Master's reports, in view of the size of the record and the importance of the proceeding.

WILLIAM B. ELLISON,
Solicitor for Defendant,
The City of New York.

WILLIAM P. BURR,
Of Counsel.

Endorsed: United States Circuit Court Southern District of New York. Consolidated Gas Company against Julius M. Mayer, Attorney General The City of New York, *et al.* Corrections to Masten's Report Submitted by Defendant, The City of New York. William B. Ellison, Corporation Counsel, Hall of Records, New York City. Filed with Master's Report Dated June 24 1907. Arthur Masten Master in Chancery U. S. Circuit Court S. D. N. Y. U. S. Circuit Court Southern District of New York. Filed June 24 1908. John A. Shields, Clerk.

481 Circuit Court of the United States for the Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Petition for Reviver and Substitution.

To the Honorable Circuit Court of the United States for the Southern District of New York:

Now, comes William S. Jackson, Attorney General of the State of New York, and represents to the Court that at a general election of the people of the State of New York, held on the sixth day of November, 1906, he, the said William S. Jackson, was duly elected Attorney General of the State of New York, and that he was duly installed and qualified for such office and entered upon his duties as such officer on the first day of January, 1907, in lieu of Julius M. Mayer, whose term of office as Attorney General of the State of New York expired on the thirty-first day of December, 1906; and he, the said William S. Jackson, petitions this Court that he may be substituted as a defendant herein in lieu of the said Julius M. Mayer, as Attorney General of the State of New York, whose term expired, as aforesaid, and that this action may be revived and continued against your petitioner as one of the defendants herein, in the same manner as if your petitioner had been named as defendant in all the pleadings and proceedings herein.

WM. S. JACKSON,
Petitioner.

ALFRED R. PAGE,
WM. A. DEFORD,
Of Counsel.

482 COUNTY OF ——, *District of New York:*

William S. Jackson, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and

knows the contents thereof, and that the same is true to his own knowledge.

WM. S. JACKSON.

Sworn to before me, February —, 1907.

June 24.

ANNA E. BURKE,
Com. of Deeds, Albany, N. Y.

483 Circuit Court of the United States for the Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York, and Others, Defendants.

Stipulation.

It is hereby stipulated and agreed that an order may be entered in this action, substituting William S. Jackson, Esq., as Attorney General of the State of New York, in lieu of Julius M. Mayer, Esq., as Attorney General of said State, and that this action stand revived as to the newly elected Attorney General, and that it may be continued in his name as one of the defendants herein, in the same manner as if said petitioner had been named as defendant in all the pleadings and proceedings herein.

SHEARMAN & STERLING,
Solicitor- for Complainant.
WILLIAM B. ELLISON,
Solicitor for Defendant, the City of New York.

Endorsed: U. S. Circuit Court, Southern District of New York. Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney General of the State of New York, *et al.*, Defendants. Petition for Review- and Substitution and Stipulation. Shearman & Sterling, Attorneys for Complainant, 44 Wall Street, N. Y. U. S. Circuit Court, Southern District of N. Y. Filed Jul- 11, 1907, John A. Shields, Clerk.

484 Circuit Court of the United States for the Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIEN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Order of Reviver and Substitution.

This cause coming on to be heard on the petition of William S. Jackson, as Attorney-General of the State of New York, to have said cause of action revived in his name as one of the parties defendant, it is

Ordered, adjudged and decreed That said petition be, and the same is hereby granted, and the cause of action is revived as to him, the said William S. Jackson, as Attorney-General of the State of New York, in his name; and he is hereby substituted as a party defendant in lieu of Julius M. Mayer, as Attorney-General of the State of New York, and this suit is hereby directed to be continued in the name of him, the said William S. Jackson, as Attorney-General of said State, as one of the parties defendant herein in the same manner as if the said petitioner had been named as a defendant in all the pleadings and proceedings herein.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Endorsed: United States Circuit Court, Southern District of New York, Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney General of the State of New York, *et al.*, Defendants. Order of Reviver and Substitution. Shearman & Sterling, Attorneys for Complainant, 44 Wall Street, N. Y. U. S. Circuit Court, Southern District of N. Y. Filed Jul- 11, 1907. John A. Shields, Clerk.

485 Circuit Court of the United States for the Southern District of New York. In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney-General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIEN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Exceptions to the Report of the Special Master.

Now comes the defendants Julius M. Mayer, as Attorney-General of the State of New York, Frederic E. Gunnison, John C. Davies and Lucien L. Shedden, constituting the New York State Commission of Gas and Electricity, and excepts to the findings of fact and conclusions of law filed herein by Arthur H. Masten, special master herein, in the following particulars, to wit:

First. These defendants except to the finding of fact on page 5 of the report, as follows: "The amount of the capital and assets
486 of the complainant as of June, 1884, exclusive of working capital in the shape of cash, accounts receivable, and current supplies was made up as follows:

Real estate	$10,332,000
Plant	12,175,000
Mains	5,217,000
Services	1,005,000
Meters	1,195,000
Office furniture and fixtures	70,000
	$29,994,000
Franchise and rights	7,781,000
	$37,775,000

The figure at which these assets were acquired by the complainant company was accordingly, $37,775,000." These defendants further specify that the evidence does not justify the said finding as a statement of the value of the assets of the complainant company in 1884.

Second. These defendants except to the refusal of the master to find, as requested by these defendants, "That the cost to the constituent companies of its several classes of property, without appreciation or depreciation, was, as shown by the books of the constituent companies, $20,942,632.85, and that the item of $7,781,000 did not represent any thing of value, but was an arbitrary figure, used for the purpose of equalizing stock values, as shown by their market price, between the constituent companies."

Third. These defendants except to the finding of fact on
487 page 13 of the report, as follows: "Taking the testimony as a whole my conclusion is that the present value of complain-

ant's real estate (exclusive of that part of the Eighteenth Street station condemned by the city) is the sum of $14,161,000," whereas the said master should have reported the value thereof to have been not to exceed $10,784,605.

Fourth. These defendants except to the finding of fact that the value of the land of the complainant on which it is entitled to earn a return is $13,461,000, at page 139 of the report. These defendants further specify that the evidence does not justify the said finding, but that the same (1) was grossly excessive of the actual value thereof; (2) that there was included therein real estate not necessarily used in the business of making and distributing gas, as more fully appears in exceptions following, and (3) that for the purpose of ascertaining the value of the property of the complainant necessarily used in business of making and distributing gas, it was erroneous to value the real estate, when the same was occupied by complainant's buildings as vacant land, and not its value, together with its buildings and for the use and purposes for which it was then used.

Fifth. These defendants except to the finding of the master at page 26, "That there was no competent proof showing that the original cost of the real estate was, as stated, only the sum of $4,118,267.38." whereas the evidence shows said sum to have been the cost price at which the real estate was carried on the books of the constituent companies.

Sixth. These defendants except to the finding of the master at page 26, "That so far as the record discloses, it is quite evident that the actual cost was in excess of that sum" ($4,118,267.38) * * * no real estate is included belonging to the Knickerbocker
488 Gas Light Company, and it appears from an examination of the report that the books of the Knickerbocker Company were not before Mr. Yalden. That it owned valuable real estate at that time does not appear to be questioned." These defendants further specify that the evidence does not justify the said finding, but that the evidence shows that the real estate which became the property of the Knickerbocker Gas Light Company was purchased from the receivers of the Union Gas Company in May, 1878, for $2,000. That there were no books of account of the Knickerbocker Gas Light Company, but that all cash was advanced by the Estate of Mrs. Elizabeth Bayard, and the accounts were kept in the books of her estate, and that the works of said company were practically destroyed by fire, and on March 11, 1880, all the stock of the Knickerbocker Company was purchased by the Municipal Gas Light Company for $350,000 in stock of the said Municipal Company at par.

Seventh. These defendants except to the finding of the master as a conclusion of law on page 26 (fol. 103), that "if the question of original cost is to be considered, it should be the cost to the complainant, the Consolidated Gas Company, and not the cost shown on the books of the constituent companies," whereas the said master should have found: That the cost of said real estate was as to the real estate acquired before consolidation, the original cost thereof to its constituent companies, and as to the real estate acquired since the consolidation, the cost thereof to the Consolidated Company.

Eighth. These defendants except to the finding of fact and con-

clusion of law, at page 27 (fols. 107, 108), that the complainant was entitled to earn a fair return upon the amount of the increase in value of its real estate holdings or of the unearned increment in the value thereof; whereas the master should have found that the complainant was not entitled to earn a return thereupon.

Ninth. These defendants except to the finding of the master at pages 16-19, that the following real estate of the complainant which is leased by it to others, should be included in the valuation of the property upon which the complainant is entitled to earn a return from its gas business:

(1) Eight lots in block 985, between Seventeenth and Eighteenth streets, leased to contractors for storing materials, at a rental of $3,170;

(2) Five lots in block 690, between Eighteenth and Nineteenth streets, Tenth avenue and Marginal street, rented for $2,000;

(3) In block 978, between Twentieth and Twenty-first streets, Avenues A and B, three tenement-houses and a lot 70 feet by 200 feet, leased at a rental of $2,916;

(4) In block 1,092, between Forty-fourth and Forty-fifth streets, Eleventh avenue and North river, four tenement-houses occupying about 50 feet front on Forty-fifth street and one tenement-house occupying 25 feet on Forty-fourth street, the latter rented for $360;

(5) In block 1,156, between Sixty-fourth and Sixty-fifth streets, Amsterdam and West End avenues, a tenement-house and lot 25 feet by 100 feet, rented for $1,248;

(6) In block 1,692, between Ninety-eighth and Ninety-ninth streets, First avenue and Marginal street, a lot on which is a small house rented and not used in the gas business;

(7) In block 952, between Twentieth and Twenty-first streets, First avenue and Avenue A, two small tenement-houses on the westerly side of Avenue A, leased by the complainant and not used in the gas business;

490 (8) In block 1,683, between One Hundred and Eleventh and One Hundred and Twelfth streets, First and Second avenues, two lots rented for the purpose of storing push-carts.

Whereas the master shall have found that the said real estate was not necessarily used in the complainant's business of making and distributing gas upon which the complainant is entitled to earn a return from its gas business and should have deducted from the valuation of the real estate of the complainant upon which it is entitled to earn a return, the sum of $268,250, allowed by him for said property.

Tenth. These defendants except to the finding of the master at pages 19-20 of the report, that the following vacant land of the complainant should be included in the valuation of the property upon which the complainant is entitled to earn a return from its gas business:

(1) In block 1,643, between One Hundred and Fifteenth and One Hundred and Sixteenth streets, Park and Lexington avenues, 100 feet on Lexington avenue, and 80 feet on One Hundred and Sixteenth street;

(2) In block 1,455, between Sixtieth and Sixty-first streets, First avenue and Avenue A, 313 feet by 200 feet;

(3) In block 1,156, between Sixty-fourth and Sixty-fifth streets West End and Amsterdam avenues, three lots, 25 feet by 100 feet;

(4) Two-thirds of block 1,999, between One Hundred and Thirty-second and One Hundred and Thirty-third streets, the plot being 675 feet by 199 feet in its longest dimension;

(5) Three-fourths of block 2,175, Sherman avenue and Broadway;

491 (6) In block 1,474, between Sixtieth and Sixty-first streets, Avenue A and East river.

Whereas the master should have found that the said real estate was not necessarily used in the complainant's business of making and distributing gas upon which the complainant is entitled to earn a return from its gas business and should have deducted from the valuation of the real estate of the complainant upon which it is entitled to earn a return, the sum of $745,155, allowed by him for said property.

Eleventh. These defendants except to the finding of the master at pages 20-22 of the report, that certain land not owned by complainant should be included in the valuation of the property upon which complainant is entitled to earn a return from its gas business. "The property embraced in this category is valued by Mr. Thompson for the city at $614,517.04, and by Mr. Wheelock for the complainant, at $932,255. It consists:

"(1) Of the land under water within the lines of Tompkins street, between Fourteenth and Sixteenth streets, East river, and certain lands adjacent thereto on either side;

"(2) The lands within the lines of Twelfth avenue, between Forty-first and Forty-second streets and Forty-fourth and Forty-sixth streets and the North river; and

"(3) Lands within the lines of Exterior street between One Hundred and Tenth and One Hundred and Eleventh streets, Harlem river."

Whereas the master should have found that the said real estate was not necessarily used in the complainant's business of making and distributing gas upon which the complainant is entitled to earn a return from its gas business, and should have deducted from the valuation of the real estate of the complainant upon which it is enti-
492 tled to earn a return, the sum of $932,255, allowed by him for said property.

Twelfth. These defendants except to the master's conclusion of law on page 21, at folio 84 of the report: "for present purposes it is sufficient if the property is occupied by complainant under a claim of title and used by it in connection with its business of gas making.

"This requirement is sufficiently met by the proof. The Tompkins street land forms a part of complainant's Fourteenth street plant and the Twelfth avenue land part of its Forty-second and Forty-fourth street land," upon the ground that complainant is entitled to earn a return only upon the property owned by it and occupied for the purposes of its business, and it cannot capitalize the value of prop-

erty to which it has not proved title; mere possession of property reserved for streets is insufficient to make title as against the city.

Thirteenth. These defendants except to the master's refusal to find, as requested at folios 639-644, "I decline to find that the remaining portion of parcel 3" (One Hundred and Eleventh street station) "or that parcel 4 (bulkhead) 7 (Sixtieth-Sixty-first streets, Avenue A wooden buildings rented) 9 (South side Fifteenth street between Avenues A and B well property), and 10 (Sixty-fifth street and West End avenue, west side vacant), are not now used by the complainant in its gas business, for the evidence shows the contrary to be the fact. I similarly decline to find as regard to land remaining in parcel 5 (Eighteenth street station) excepting one block valued at $400,000, which I have already excluded on my report," as requested by these defendants. These defendants further specify that the evidence does not justify the refusal to find, but on the contrary
493 thereof, it appears clearly from the evidence that none of the said properties are used by the complainant in its gas business.

Fourteenth. The defendants except to the finding on page 36 at folios 144-147 of the master's report, to-wit: "I accordingly find and report the value of the complainant's plants to be substantially in accordance with the estimate of Mr. Mayer, a summary of which is given below, but adopting, for purposes of convenience and to allow for possible over-valuations in some details, the round figure of $15,500,000 instead of $15,532,489, as shown by the appraisal.

Valuations of Plants and Holder Stations, Depreciation Deducted.

Twenty-first street plant, including all holders	$4,162,021	
Forty-fourth street plant, including all holders	2,000,205	
Ninety-ninth street plant, including all holders	963,011	
Fourteenth street plant, including all holders	2,549,545	
Forty-second street plant, including all holders	1,744,660	
Eighteenth street plant, including all holders	588,873	
Total for all plants		$12,008,315
Sixty-third street holder station, complete	$490,072	
Sixty-fifth street holder station, complete	1,427,317	
One Hundred and Eleventh street holder station, complete	1,039,910	
494 One Hundred and Thirty-second street holder station, complete	$540,702	
Inwood street holder station, complete	26,173	
Total for all holder stations		3,524,174
		$15,532,489

"This may be fairly said to represent the cost of reproducing the property as it stands;" whereas the master should have found that the value upon such basis was $9,348,692, and that the valuation of complainant's witness so adopted by the master was excessive.

Fifteenth. These defendants further except to each specification of value on page 37, for the reason that there is no proper foundation in the evidence to sustain such finding. That the theory upon which the valuation was made is erroneous, in that the present cost of reproducing the identical apparatus was used irrespective of the fact as to whether the particular apparatus was commercially and economically worth reproducing, and does not show the value of a modern plant that would accomplish the same results.

Sixteenth. These defendants further except to the last-mentioned finding as to valuation of plants, in that there is included therein the valuation of buildings not calculated upon the cost to reproduce the same by considering the cost of material and labor that entered therein, but based upon an estimated valuation in accordance with the cubical contents thereof by comparison with the buildings of the Kings County Gas and Illuminating Company.

495 *Seventeenth.* These defendants further except to said finding, on the ground that there is included therein in the valuation of the Eighteenth street plant the sum of $453,695, as a reproduction value of the dismantled and abandoned manufacturing plant which is not now used in the business of the company, whereas the said amount should have been deducted from the valuation contained in the said finding.

Eighteenth. These defendants further except to the said finding of fact, on the ground that in the One Hundred and Eleventh street holder station there is included $428,019 as the value of the dismantled and abandoned manufacturing plant at the said station, whereas the said amount should have been deducted from the valuation contained in the said finding.

Nineteenth. These defendants further except to the said finding of fact, on the ground that there is included therein the value of the Inwood street holder station, complete, $26,173, whereas the same should have been deducted from said finding because the evidence shows that the same has been abandoned and is not used in the business of the company.

Twentieth. These defendants except to the master's finding of fact, at pages 31 and 32, "as regards to buildings, Mr. Mayer took as his unit similar buildings recently erected by him in the city of New York for the Kings County Gas and Illuminating Company. From such unit figures he computed the valuations of complainant's buildings by the method of comparative cubical contents, and of the master's further finding that the valuations thus ascertained were the correct valuations of the buildings of the complainant, and carrying the same in the finding as to value into the valuation of plants and holder stations, on page 37, whereas the master should have

496 found that the valuation of the buildings should have been computed from the cost of materials and labor entering into the construction thereof.

Twenty-first. These defendants further except to the master's finding of fact, that the buildings of the Kings County Gas and Illuminating Company were similar to the buildings of the complainant, on the ground that there is no evidence tending to sustain the said finding.

Twenty-second. These defendants further except to the finding of the master as a conclusion of law, on page 37, folio 147, in finding that with regard to the valuation of the plant, holder stations, mains and services, the reproductive cost thereof affords the only practical basis of present valuation, but on the contrary thereof the master should have found, as a conclusion of law, that the value of complainant's plant, holder, station, mains and services should be ascertained by finding the cost thereof to the complainant and making due allowance for depreciation, or, if the reproductive value on the basis of a new plant was to have been ascertained, the master should have found, as a conclusion of law, that the complainant be allowed the value of a modern, up-to-date plant capable of producing the same quantity and quality of gas as now produced by it.

Twenty-third. These defendants except to the finding of fact of the master on page 38, folio 151, that "the evidence shows that on October 31, 1905, complainant's mains of various sizes amounted in the aggregate to 822 miles exclusive of 70 or 80 miles of abandoned mains, on the ground that the evidence shows that the complainant has 795.47 miles of active mains, and that the complainant is only entitled to a return upon the value of such mains as are now in active use.

497 *Twenty-fourth.* These defendants except to the finding of fact of the master on page 39, folio 153, page 139, folio 555, that the present value of the mains based on the cost of reproduction upon which the complainant is entitled to earn a return was $12,636,000, whereas the said master should have found the same upon the basis of cost of reproduction to be $6,529,035.

Twenty-fifth. These defendants further except to the said finding that $12,636,000 is the value of the mains upon which the complainant is entitled to earn a return, whereas the evidence shows that the same were carried on the books of the company at the sum of $7,852,000, and that in said finding the master has allowed $4,784,000 as an estimated increase of cost to relay all the mains of the said company by reason of the changes in the pavements of the streets of the city, and that the same represents no outlay on the part of the company.

Twenty-sixth. These defendants except to the finding of fact of the master on page 41, folio 162, that the cost of reproducing the services at present prices would be $1,994,000, and the allowance of $1,994,000 as the value of the services on which complainant is entitled to earn a return, on page 139, folio 554, whereas the evidence shows that the cost of the services to the complainant is $1,222,228.37, which the master should have taken as the value of the services on which the complainant is entitled to earn a return.

Twenty-seventh. These defendants except to the master's refusal to find at page 41, folios 162-163, that the appraised value of both

mains and services at the time of the consolidation in 1884, was far in excess of their cost, and that the value of mains and services devoted by complainant to the public use as of December 31, 1905, was $6,359,324.46, which represents the original cost of
498 mains and services transferred by the constituent companies to complainant, plus the expenditures of the complainant since 1884 on account of new construction thereof, and that the reasons stated for the said refusal to find at folios 163-165 are misleading and not supported by the evidence adduced before the said master.

Twenty-eighth. These defendants except to the finding of fact (page 42, folio 166), that the meters and miscellaneous personal property are valued at $4,100,000, and carried into the valuation of the property on which complainant is entitled to a return at that figure, on page 139, folio 554 of the report, whereas the master should have found that they were worth not to exceed $3,802,544.50, at which value they were carried on the books of the company as the original cost thereof.

Twenty-ninth. These defendants except to the finding of fact and of law on page 42, folio 168, that the complainant, in addition to the value of its materials and supplies on hand and $1,000,000 in cash as a working capital should be allowed for accounts receivable and outstanding to the extent of $2,000,000 as an item upon which the consumers of gas are required to pay a return, but on the contrary thereof such item should have been excluded.

Thirtieth. These defendants except to the finding of fact and of law on page 48, folio 189, that the complainant should be allowed $12,000,000 as its investment in the Astoria plant and the carrying of the said sum of $12,000,000 into the valuation of the property on which the complainant is entitled to earn a return (page 139, folio 555), for the reason that so far as it involves the finding of fact, it is without evidence tending to support it, and in so far as it involves a conclusion of law is erroneous.

499 *Thirty-first.* These defendants except to the finding of fact of the master, that the plant and property owned by the Astoria Light, Heat and Power Company designated as the Astoria plant in said report is the property of the Consolidated Gas Company and an asset thereof, whereas the master should have found the same to have been property owned by the said Astoria Light, Heat and Power Company.

Thirty-second. To the finding of fact on page 52, folio 207, "I, therefore, allow item No. 8" (the value of the Astoria plant, $12,000,000) "as claimed by complainant, although the Astoria plant was not in operation and delivering gas in 1905, such item should for the sake of accuracy, be designated as property of other companies employed in the production of gas delivered by them to the complainant," for the reason that the finding of the master that complainant is entitled to earn a return upon the capital invested in their business by other companies from whom the complainant purchases gas is an erroneous conclusion of law, and there is no evidence tending to support the same as a finding of fact. That the

evidence shows that the complainant paid to other companies for the gas purchased from them at the rate of cost and 10 per cent. in addition, and that under this arrangement the complainant paid to other companies in the year 1905, the sum of $997,039.89, 10 per cent. of which, $99,703.99,, would represent the return on capital devoted by said companies to the production of gas for complainant, whereas the master allows as a reasonable return therefor 6 per cent. on $12,000,000, or $720,000.

Thirty-third. These defendants except to the finding of the master, at page 90, folio 360, that the complainant's franchises are of the reasonable value of $20,000,000, and that the carrying of that
500 amount into the valuation of the property on which the complainant is entitled to earn a return, on page 139, folio 555, for the reason that in so far as the same is a finding of fact there is no evidence tending to support the value thereof, and in so far as the same is a conclusion of law the same is erroneous.

Thirty-fourth. These defendants except to the mixed finding of fact and conclusion of law of the master, at pages 52-73, folio 289, that the complainant, on the date of the enactment of the statutes involved in this suit and the making of the order complained of owned, by virtue of the consolidation whereby complainant was created, franchises to carry on a gas business in the city of New York, and to use the streets, avenues and public places thereof for that purpose, as follows: The franchises granted to the New York Gas Light Company, the Manhattan Gas Light Company, the Metropolitan Gas Light Company, the Municipal Gas Light Company, and to the further finding that such franchises were, at the dates aforesaid, property devoted by complainant to the public use, whereas said master should have found, under the evidence, that at the times aforesaid the said franchises, rights and privileges formerly conferred thereby had ceased, terminated and expired.

Thirty-fifth. These defendants further except to the finding of fact and conclusion of law, that complainant was the owner, by virtue of the consolidation whereby it was created, of the franchises to carry on a gas business in the city of New York, and to use the streets, avenues and public places thereof for that purpose claimed by the Knickerbocker Company, by and under chapter 944 of the Laws of 1871, whereas said master should have found that the said Knickerbocker Company never owned or had the legal title to the franchises, if any conferred thereby, and that complainant
501 never held nor owned and has never been entitled to, and is not now entitled, to use the same.

Thirty-sixth. These defendants further except to the finding of fact and conclusion of law, that said complainant owned, by virtue of the consolidation whereby it was created, the franchises to carry on the gas business in the city of New York, and to use the streets, avenues and public places thereof for that purpose, granted to the Harlem Gas Light Company, and that the same was an assignable franchise in perpetuity at the time of the enactment of the statutes and of the making of the order complained of, property of the complainant devoted by it to the public use; whereas the said master

should have reported that the said franchises granted to the Harlem Gas Light Company ceased and expired on February 1, 1907, and are not the property of the complainant and are not, and were not at the dates aforesaid, property devoted by the complainant to the public use.

Thirty-seventh. These defendants except to the finding of fact and conclusion of law that the franchises of the constituent companies to carry on the gas business in the city of New York, and to use the streets, avenues and public places thereof for that purpose, claimed to be owned by the complainant, were property devoted by complainant to the public use upon which it was entitled to earn a fair return at the time of the enactment of the statutes and of the making of the order complained of; whereas said master should have found that said franchises were not at said dates property devoted by complainant to the public use, upon which it was entitled to earn a return.

Thirty-eighth. These defendants except to the finding of the master, that the franchises of complainant and of the good
502 will appertaining to it as a corporation engaged in the gas business in the city of New York, and in using the streets, avenues and public places thereof for that purpose, were property devoted by complainant to the public use, upon which it was entitled to earn a fair return, and were of the value of $20,000,000; whereas the said master should have found and reported that neither said franchises nor good will were property devoted to the public use, upon which complainant was entitled to earn a return; and that the franchises of complainant, if of any value, did not exceed the sum of $200,000; and that the good will did not exist as an asset of complainant, and was not property devoted by complainant to the public use.

Thirty-ninth. These defendants except to the finding of fact and conclusion of law of the master, on page 139, folios 554-556, that the property upon which complainant is entitled to earn a return, as hereinbefore found, amounting to $83,357,000, is made up as follows:

"I. Real property (less deductions)	$13,461,000
II. Plant	15,500,000
III. Mains	12,636,000
IV. Services	1,994,000
V. Meters and miscellaneous	4,100,000
VI. Working capital	3,616,000
VII. Coal and coke company	50,000
VIII. Astoria, *i. e.* capital invested in production of gas secured from the other companies	12,000,000
	$63,357,000
IX. } X. } Franchises and good will	20,000,000
	$83,357,000"

503 *Fortieth.* These defendants except to the finding of the master as a matter of fact and conclusion of law, at page 101, folios 404-407, that in ascertaining the cost of making gas in the year 1905 there should be included item 47 of complainant's exhibit No. 94, repairs to gas stoves, $55,954.35; whereas the master should have found that the complainant received a rental from its gas stoves of $67,367.62, and that the repairs to said gas stoves are $55,954.35 deducted therefrom, leaving a net income of $11,413.27, and that as a conclusion of law the master should have found that the repairs to gas stoves did not properly enter into the computation of the cost of making gas.

Forty-first. These defendants except to the finding of the master on page 102 of the report, that the amount expended by the company in caring for street lamps, item 53 of complainant's exhibit No. 94, $289,259.09, is a proper charge or element of the cost of gas.

Forty-second. These defendants except to the finding of the master on page 103 of the report, that the sum of $25,671.74, representing disbursements in connection with legislative investigations included in item 58 of complainant's exhibit No. 94, general office expenses, is a proper charge or element of the cost of gas.

Forty-third. These defendants except to the finding of the master on page 103 of the report, that the sum of $63,401.65 covering expenses growing out of franchise tax litigation included in item 61 of complainant's exhibit No. 94, advertising and legal expenses, is a proper charge or element of the cost of gas.

Forty-fourth. These defendants except to the finding of the master on page 104 of the report, that rentals paid by complainant for premises hired by it, $42,674.71, item 62 of complainant's exhibit No. 94, there being no evidence tending to show that the
504 property so rented was necessarily used in the business of making and distributing gas.

Forty-fifth. These defendants except to the finding of the master on page 104 of the report, that the complainant be allowed the following amount included in item No. 66, complainant's exhibit 94, as a proper charge or element of the cost of gas: "taxes on $41,356,409.86, stock in gas business, $62,034.61," meaning thereby taxes on dividends in excess of 4 per cent. on capital stock claimed by the complainant to be employed in its gas business.

Forty-sixth. These defendants except to the finding of the master on page 104 of the report, that the complainant should be allowed the following amount included in item No. 66, complainant's exhibit 94, as a proper charge or element of the cost of gas: "interest on unpaid taxes, $94,506.29."

Forty-seventh. These defendants except to the finding of the master on page 105 of the report, that the sum of $1,328,316.37, item No. 67, complainant's exhibit 94, should be included as a charge or element of the cost of gas as a contingent expense of ten cents per thousand cubic feet of gas sold, based upon the total sales in 1905; whereas the master should have found that such item did not represent the actual disbursement or expenses of the complainant, except

to the amount of $222,382.82, and over and above said amount was not a proper charge or element of the cost of gas.

Forty-eighth. These defendants except to the finding of fact on pages 123, 124 of the report, that the gas sold by compainant during the calendar year 1905, as shown by complainant's exhibit No. 94, cost complainant, upon a fair computation, the sum of 65.84 cents, whereas said master should have found the cost thereof to
505 have been, upon a fair and proper computation thereof, as per exhibit No. 94, the sum of 52.50 cents; that the report of the master in this respect, in so far as it involves the finding of fact, was without the support of evidence, and in so far as it involves a conclusion of law is erroneous.

Forty-ninth. These defendants except to the finding of the master on page 141, folio 561, that a charge of 80 cents per thousand cubic feet of gas sold by complainant would yield on complainant's entire assets a return of 2.8 per cent., and on its assets, exclusive of franchises and good will, 3.6 per cent., neither of which constitutes a fair and reasonable return on the value of such property, which finding, in so far as it involves that finding of fact, is not supported by evidence, and in so far as it involves a conclusion of law, is erroneous.

Fiftieth. These defendants except to the finding of the master at page 141, folio 561, as a conclusion of law, that complainant is entitled to receive at least the legal rate of interest at the rate of 6 per cent. per annum, as a return upon its investment.

Fifty-first. These defendants except to the finding of the master as a conclusion of law that the rate of 80 cents per thousand cubic feet for gas, does not allow to the complainant a reasonable return upon its property actually and necessarily used in the business of making and distributing gas.

Fifty-second. These defendants except to the finding of the master on page 144, folio 574 "under the distributing system as now existing and in operation, it is not possible to fulfill the statutory requirements as to pressure," and in so far as the same is a finding of fact, it is not supported by the evidence, and in so far as it is a conclusion of law it is immaterial and has no bearing upon the case.

506 *Fifty-third.* These defendants except to the allowance of the IV amendment proposed by the complainant on page 147, on the ground that there is no evidence tending to support the said finding, as amended.

Fifty-fourth. These defendants except to the allowance of the complainant's VI proposed amendment, and to the finding, as amended on page 148, on the ground that in so far as the same is a finding of fct, there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law, it is erroneous.

Fifty-fifth. These defendants except to the allowance of the complainant's VIII proposed amendment, and to the finding, as amended on page 148, on the ground that in so far as the same is a finding of fact, there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law, it is erroneous.

Fifty-sixth. These defendants except to the allowance of the com-

plainant's X proposed amendment, and to the finding, as amended, on page 149, on the ground that in so far as the same is a finding of fact there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law it is erroneous.

Fifty-seventh. These defendants except to the allowance of the complainant's XI proposed amendment, and to the finding, as amended, on page 149, on the ground that in so far as the same is a finding of fact there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law it is erroneous.

Fifty-eighth. These defendants except to the allowance of the complainant's XII proposed amendment, and to the finding, as amended, on page 150, on the ground that in so far as the same is a finding of fact there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law it is erroneous.

Fifty-ninth. These defendants except to the allowance of
507 the complainant's XIII proposed amendment, and to the finding, on page 150, as amended, on the ground that in so far as the same is a finding of fact there is not sufficient evidence to sustain it, and in so far as it is a conclusion of law it is erroneous.

Sixtieth. These defendants further except to the allowance of the XV proposed amendment, on page 152, on the ground that in so far as the same is a finding of fact it is based upon a hypothetical and absurd supposition; that in so far as the same is a conclusion of law the same is erroneous.

Sixty-first. These defendants except to the refusal of the master to find the fifth special finding of fact, and each and every part thereof, as requested by these defendants, at page 169 of the said report.

Sixty-second. These defendants except to the refusal of the master to find the twelfth special finding of fact, and each and every part thereof, as requested by these defendants, at page 172 of the said report, except as to the sum of $369,965.53, as stated therein, which should have been $5,369,065.53, which was a typographical error, as will appear from the total set forth in said request to find.

Sixty-third. These defendants except to the refusal of the master to find the thirteenth special finding of fact, and each and every part thereof, as requested by these defendants, at page 173 of the said report.

Sixty-fourth. These defendants except to the refusal of the master to find the fourteenth special finding of fact, and each and every part thereof, as requested by these defendants, at page 174 of the said report.

Sixty-fifth. These defendants except to the refusal of the master to find the nineteenth special finding of fact, and each and every part thereof, as requested by these defendants, at page 176 of the said report.

Sixty-sixth. These defendants except to the refusal of the
508 master to find the twentieth special finding of fact, and each and every part thereof, as requested by these defendants, at pages 176-177 of the said report.

Sixty-seventh. These defendants except to the refusal of the mas-

ter to find the twenty-first special finding of fact, and each and every part thereof, as requested by these defendants, at page 177 of the said report.

Sixty-eighth. These defendants except to the refusal of the master to find the twenty-third special finding of fact, and each and every part thereof, as requested by these defendants, at pages 177-178 of the said report.

Sixty-ninth. These defendants except to the refusal of the master to find the twenty-fourth special finding of fact, and each and every part thereof, as requested by these defendants, at page 178 of the said report.

Seventieth. These defendants except to the refusal of the master to find the twenty-fifth special finding of fact, and each and every part thereof, as requested by these defendants, at page 178 of the said report.

Seventy-first. These defendants except to the refusal of the master to find the twenty-eighth special finding of fact, and each and every part thereof, as requested by these defendants, at page 179 of the said report.

Seventy-second. These defendants except to the refusal of the master to find the twenty-ninth special finding of fact, and each and every part thereof, as requested by these defendants, at pages 179-180.

Seventy-third. These defendants except to the refusal of the master to find the thirtieth special finding of fact, and each and every part thereof, as requested by these defendants, at page 180 of the said report.

Seventy-fourth. These defendants except to the refusal of the master to find the thirty-first special finding of fact, and each and every part thereof, as requested by these defendants, at page 180 of the said report.

509 *Seventy-fifth.* These defendants except to the refusal of the master to find the thirty-third special finding of fact, and each and every part thereof, as requested by these defendants, at page 181 of the said report.

Seventy-sixth. These defendants except to the refusal of the master to find the thirty-seventh special finding of fact, and each and every part thereof, as requested by these defendants, at page 183 of the said report.

Seventy-seventh. These defendants except to the refusal of the master to find the forty-second special finding of fact, and each and every part thereof, as requested by these defendants, at page 184 of the said report.

Seventy-eighth. These defendants except to the refusal of the master to find the forty-third special finding of fact, and each and every part thereof, as requested by these defendants, at page 185 of the said report.

Seventy-ninth. These defendants except to the refusal to find the I request to find, at pages 160-161, in the form and manner as proposed by these defendants.

Eightieth. These defendants except to the refusal to find the II

request, at pages 161-163, in the form and manner as proposed by these defendants.

Eighty-first. These defendants except to the refusal to find the III request to find, at page 163, in the form and manner as proposed by these defendants.

Eighty-second. These defendants except to the refusal to find the IV request, at pages 163, 164, in the form and manner as proposed by these defendants.

Eighty-third. These defendants except to the refusal to find the VI request to find, at pages 164, 165, as therein stated, and further except to the statement given for disallowing the request as not founded upon the evidence.

510 *Eighty-fourth.* These defendants except to the further finding under the VIII request to find on page 166, as follows:

"The evidence further shows and at the request of complainant's counsel I find that the contract of April 26, 1904, provided for the delivery of high-grade and low-grade oil in certain proportions "currently." The meaning of this term, as understood both by the complainant and the oil company, was that oil must be taken from month to month in the proportions specified in the contract; so that while the complainant had received under the contract an amount of oil considerably less *in toto* than the total specified in said contract, it could not call during the winter of 1905-'6 for all high-grade oil. The use of high-grade oil during the cold months to meet the requirements of the act of 1905, prescribing 22-candle power after July first of that year, was advised by the chief engineer. It was accordingly necessary to readjust the current contract and the contract of November 1, 1905, was made for that reason. It is computed that the additional cost resulting added .0013 of a cent per thousand feet to the cost of gas for 1905."

Eighty-fifth. These defendants except to the refusal to find the XI request to find at page 167 in the form and manner proposed by these defendants.

Eighty-sixth. These defendants except to the refusal to find the concluding sentence of the XII request to find, at page 168, which is as follows: "A reduction in the price of gas leads to a proportionate increase in consumption in the City of New York to 46.46 cubic feet for each cent of reduction."

Respectfully submitted,

WILLIAM L. JACKSON,
Solicitor for Defendants.

ALFRED R. PAGE,
WILLIAM A. DEFORD,
Of Counsel.

The defendant Wm. Travers Jerome hereby joins in the foregoing exceptions.

ROBERT C. TAYLOR,
Solicitor for Wm. Travers Jerome.

July 23, '07.

511 Endorsed: Circuit Court of the United States, Southern District of New York. The Consolidated Gas Company of New York, Complainant, against Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District Attorney of New York County, Frederic E. Gunnison, John C. Davies and Lucien L. Shedden, constituting the New York State Commission of Gas and Electricity, and The City of New York, Defendants. In Equity. Exceptions to the Report of the Special Master. William Schuyler Jackson, Attorney General of the State of New York, Solicitor for Defendants Mayer and Gunnison, Davies & Shedden, as the Commission of Gas and Electricity. Alfred R. Page, William A. Deford, of Counsel. U. S. Circuit Court, Southern District of N. Y. Filed July 24, 1907. John A. Shields, Clerk.

512 Circuit Court of the United States, Southern District of New York.

THE CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
JULIUS M. MAYER, as Attorney-General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERICK C. GUNNISON, JOHN C. DAVIES, and THOMAS L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Exceptions to Master's Report.

Exceptions Taken by the Defendant The City of New York to the Report Made Herein and Entered on the 24th Day of June, 1907, by Hon. Arthur H. Masten, one of Masters of This Court, to Whom This Cause was Referred by an Order Dated July 9, 1906.

First exception. For that the said Master in his report, on
513 page 139, folios 554-556, finds that the property on which the complainant is entitled to a return amounting to the sum of $83,357,000, made up as follows:

"I. Real Estate, less deductions	$13,461,000	00
II. Plants	15,500,000	00
III. Mains	12,636,000	00
IV. Services	1,994,000	00
V. Meters and Miscellaneous	4,100,000	00
VI. Working Capital	3,616,000	00
VII. Coal and Coke	50,000	00
VIII. Astoria, *i. e.*, capital invested in production of gas secured from other companies	12,000,000	00
	$63,357,000	00
IX. and X. Franchises and Good Will	20,000,000	09
	$83,357,000	00

Whereas he should have found that such amount was $30,949,327, as stated on page 9, folios 33-36 of the report, and made up as follows:

"I. Real Estate	$10,587,685 00
II. Plants	9,348,692 00
III. Mains	6,529,035 00
IV. Services	1,222,228 00
V. Meters and Miscellaneous	3,261,687 00
	$30,949,327 00"

The Actual Cost to the Complainant.

Second exception. For that the said Master has found on page 5 of his report:

"The amount of the capital and assets of the complainant
514 as of June, 1884, exclusive of working capital in the shape of cash, accounts receivable and current supplies, was made up as follows:

Real Estate	$10,332,000 00
Plant	12,175,000 00
Mains	5,217,000 00
Services	1,005,000 00
Meters	1,195,000 00
Office Furniture and Fixtures	70,000 00
	$29,994,000 00
Franchises and Rights	7,781,000 00
	$37,775,000 00"

The figure at which these assets were acquired by the complainant company and upon which its books were opened was accordingly $37,775,000."

On page 42, as corrected by Complainant's Amendment I, p. 146:

"As regards mains and services, therefore, as well as real estate, plant and other tangible property, it does not appear that any sufficient ground exists for the suggestion that the appraised value of 1884 was materially, if at all, in excess of the aggregate cost of the tangible property to the constituent companies."

On pages 149-150, Complainant's Amendments XI. and XII., as allowed:

"XI. Page 141, following line 12, insert: 'Although in my view, as above expressed, of the basis of valuation upon which the complainant is entitled to a return, no additional findings on that subject are necessary, for the further information of the Court I find upon the evidence that the *actual cost* to complainant of the tangible

property and franchises employed in its gas business (including the amount found by me to be the capital invested in production of gas for complainant outside complainant's Manhattan works) is at least $60,214,000, made up as follows:

I. Real estate, at least	$9,322,000
II. Plants (Manhattan), at least	14,579,000
III. Mains, at least	7,852,000
IV. Services, at least	1,212,000
V. Meters and miscellaneous, at least	3,802,000
VI. Working capital, at least	3,616,000
VII. Coal and Coke Co.	50,000
VIII. Astoria unit (*i. e.*, capital invested in production of gas sold by complainant, made outside complainant's Manhattan Works)	12,000,000
IX. Franchises and rights	7,781,000
Total	$60,214,000

If franchises and good will be included together at the aggregate value of $20,000,000 above found by me, in lieu of the item of 'Franchises and Rights,' the actual cost to complainant of its tangible property, plus the value of its franchises and good will, is at least $72,433,000.

Allowed and I so find.

XII. Following the last preceding proposed finding insert:

'There is no satisfactory evidence that the cost to complainant of said property was unreasonable or excessive; or that the cost of production of said property was enhanced through faulty construction or waste; or that the various sums expended from time to time by complainant or its predecessor companies in permanent improvements and betterments were not intelligently and properly expended, or that any such expenditure was made otherwise than providently and honestly.

'Nor is there any satisfactory evidence that any of the expenditures of complainant for material, labor or otherwise, in the manufacture and distribution of gas, have been improper, unnecessary or unreasonable.' "

And on page 153 said Master refused to find:

"That the cost to the constituent companies of its several classes of property, without appreciation or depreciation, was as shown by the books of the constituent companies, $20,942,632.85, and that the item of $7,781,000 did not represent anything of value, but was an arbitrary figure used for the purpose of equalizing stock values, as shown by the market prices, between the constituent companies."

Whereas he should have found, as requested on page 153, and also that by said consolidation in 1884 the capital of complainant was arbitrarily written up over the capital of the six constituent companies, by the amount of over $17,000,000 on the basis of the market valuation of the stock of the constituent companies, without any expenditure of cash for such increase; that the appraisal of 1884 exceeded the then value of the property as carried on

the books of the constituent companies by taking the duplication value as estimated by themselves as distinguished from the cost less depreciation, as the basis; that such transaction cannot in equity be considered a purchase of the property by the complainant from its six constituent companies; and if so considered, said complainant paid in excess of its real value therefor, and such excess cannot be included in an investment on which a return is to be allowed.

That the consolidation under chapter 367, Laws of 1884, was unauthorized and against public policy, as such act cannot be construed to cover gas companies.

517 That not sufficient opportunity was given defendant to examine cost of construction of complainant's works.

I.—Real Estate.

Third Exception. For that the said Master, in his report, pages 10, 11, 12 and 13 finds:

"Without discussing in detail the evidence as to each parcel, I may say that, after a careful consideration, I am satisfied that the valuations claimed by the complainant are, as a rule, approximately correct. In arriving at that conclusion I have taken into account the standing and qualifications of the various witnesses, the degree of care devoted to their investigations, the extent of their familiarity with general real estate conditions in The City of New York, and their demeanor under cross-examination.

"The chief witness for the complainant, Mr. Wheelock, is connected with one of the largest and best known real estate offices in this City, and has taken part personally in the actual purchase and sale of a very large amount of property in various parts of Manhattan Island. Preparatory to testifying in this case, he spent some six weeks in an examination of the properties and an investigation of such facts as would tend to enlighten him as to their value, including sales of neighboring property.

"Mr. Preiss, a real estate dealer and appraiser of many years' experience, was also very fully advised as to current real estate transactions.

"Mr. Greene, as engineer in chief of the Department of Docks for many years, acquired a familiarity with the terms of leases and sales of water front property and was qualified by experience to testify as to values in a degree not shown by any of the other witnesses.

518 "Messrs. Thompson and McHale, the witnesses called by the City, appear to have made a specialty of appraising rather than of dealing in real estate as brokers. As appraisers, their experience has been to a considerable extent in condemnation proceedings where they have testified on behalf of the City or in certiorari proceedings for the reduction of taxation, on behalf of the property owners. Their manifest tendency was towards ultra conservatism of views, and I am satisfied that in the present case their valuations (which are frequently identical) are, in almost every instance, considerably too low. Their cross-examination disclosed numerous instances in which they disclaimed knowledge of actual

sales in the immediate vicinity of the parcel under consideration, notwithstanding such sales were matters of public record. In a dozen or more instances their valuations approximated, or were substantially below, the assessed valuation of the land. It is, of course, true that the assessed valuation of real property is often equal to or higher than its actual value, but it is generally understood, and was in fact admitted on the record that as a rule, tax values are substantially lower than the prices that can be realized for property sold under ordinary conditions. When, therefore, in so many instances defendants' witnesses made their valuations approximate closely the assessed valuations, some question is suggested as to the weight to be given to their judgment.

"Mr. Wells, the witness called by the State, was an auctioneer, broker and appraiser of long experience, and also had acquired familiarity with real estate values as Commissioner of the Tax Department for several years. His record, however, disclosed no such extensive transactions, and particularly current transactions, as those with which Mr. Wheelock was connected. Like the other
519 witnesses called by defendants, he was not familiar in many instances with recent sales of property in the immediate neighborhood of the particular parcel under consideration. Taken as a whole the testimony of these gentlemen does not show that they gave to their appraisals the amount of care and study that characterized the work of complainant's witnesses. For example, one witness in valuing the property occupied by the company at Forty-second street and Forty-fourth street, excluded that portion of it comprised within the lines of Twelfth avenue, on the ground that the company had no title thereto. He failed, however, to make any allowance for the fact that on this theory certain of the lots remaining would have an enhanced value as corner lots which, according to well-known rules, make them worth often 50 or 60 per cent. more than interior lots in the same block. In another instance no allowance was made for the circumstance that the parcel in question had a frontage both on an avenue and a side street. The discrepancy between complainant's valuations and those of the defendant was especially noticeable in respect of the large parcels. As to those, defendant's witnesses made what seem to me an insufficient allowance for what is known as 'plottage' or the enhancement of value due to the concentration in a single ownership of a number of adjoining lots. This is a well recognized element of value, and one which has assumed increasing importance in recent years owing to the growing demand for large building sites. In repeated instances defendant's witnesses were unable to specify any transactions in the neighborhood at unit figures as low as those given in their valuations, whereas complainant's in the great majority of cases were able to substantiate or at least to some extent to support their estimates by reference to actual transactions.

520 "Taking the testimony as a whole, my conclusion is that the present value of complainant's real estate (exclusive of that part of the Eighteenth street station condemned by the City) is the sum of $14,161,000. This includes the buildings valued by

the witnesses and the various bulkhead properties, also the property at Shadyside, New Jersey, and is allotted between the various parcels as follows:

And on page 139, has carried the sum of $13,461,000 without deductions, into the amount on which a return is allowed.

Whereas he should have found—

I. That such figures for the present value of the real estate were grossly excessive, that the actual value was more nearly coincident with the testimony of the defendants' witnesses, and the assessed valuation of the real estate for purposes of taxation, and did not exceed, excluding the value of Eighteenth street land condemned the amount of $11,289,212.74, as found by McHale.

That Thompson has been engaged in buying and selling, as well as appraising real estate for a period of 14 years (pp. 2744-5): Whereas Wheelock has only been in the business eight years, has only specialized as an appraiser 2½ years, and acted as collecter of rents for a considerable period (pp. 1125-7).

That while the defendants' witnesses have in 12 out of 51 instances arrived at valuations equal to or below the assessed valuations, such determination is no reflection on their judgment. That McHale and Thompson were both witnesses for the complainant in various certiorari proceedings to review the various assessments of some of those parcels for the past few years (pp. 2724, 2810, 2814, 2834). That ninety odd petitions have been filed by complainant for such purpose during the years 1903-1904, 1905-1906 (pp. 2626 to 2722). That in such petitions complainant has admitted the value of such parcels at amounts greatly below the values now claimed, as follows:

PAGE BOUND VERTICAL IN BOOK

521 Block.	Lot.	Page.	Year.	Valuation admitted by complainant as excessive of what property would sell for under ordinary circumstances.	Amount to which reduction was asked.	Master's valuation.
991	1	2670	1904	$180,000 00	$156,250 00	$233,000 00
991	26	2673	1904	125,000 00	106,250 00	157,000 00
988	1	2669	1905	550,000 00 (with improvements)	400,000 00(*a*)	570,000 00
979	1	2660	1906	542,000 00 "	351,500 00	570,000 00
1090	23	2678	1905	53,000 00 "	46,000 00	72,000 00
1070	5	2675	1905	70,000 00 "	62,500 00	83,000 00
1089	1	2676	1906	800,000 00 "	525,000 00	1,150,000 00
1093	1	2681	1906	425,000 00 "	250,000 00	546,000 00

(*a*) Page 2670 admits land appraised after January 1, 1905, at $293,188, by skillful real estate experts.

522 That the assessed valuation of the land alone ($8,508,100) is 78 and 80 per cent. of the totals of Thompson & McHale, respectively, excluding Shadyside (pp. 2897 and 2903) while the proportion of such assessed valuation to the figure of the complainant's witnesses of $13,861,000, after deduction of $151,000 for the value of buildings, is only 62 per cent., which clearly manifests that such total is excessive, as it is unreasonable to suppose that out of a total of 51 parcels situate in various parts of the Borough of Manhattan and assessed on a basis of 100 per cent., could fall as far as 38 per cent. short, where the complainant has contested the assessment of so many parcels for overvaluation.

That the valuation given by the complainant to its land in its statement to the Board of Taxes and Assessments is $11,216,479.71. (Master's Report, p. 98; State's Ex. D., p. 402, of Exhibits for 1904; State's Ex. C., p. 388, of Exhibits for 1905.)

II. That there were included therein real estate not necessarily used in the gas business of making and distributing gas as more fully appears in Seventh, Eighth, Ninth, Tenth and Twelfth Exceptions.

That by computation from the testimony and exhibits it appears that not more than one-half the real estate of complainant was occupied by buildings and gas holders. Also, that the large holdings of real estate were predicated upon the manufacture of coal gas, by methods and apparatus long since obsolete; that 80 per cent. of the gas actually produced by the complainants was of a kind known as water gas, which required, according to the testimony and exhibits, less than one-fourth the space actually occupied for the manufacture of coal gas. That from choice the complainant leads a "hand-to-mouth" existence as far as storage of supplies is concerned. That it does not undertake the treatment of residuals, and the large
523 areas and buildings devoted to storage are only nominally so; that real estate acquired in recognition of the former state of the art, purchased from surplus after the payment of large dividends, are not required in the present state of the art; that the complainant was only justified in retaining such real estate as required by the present state of manufacture, with a reasonable margin for growth.

III. That for the purpose of ascertaining the value of the property of the complainant necessarily used in the business of making and distributing gas, it was erroneous to value said real estate, when the same was occupied by complainant's buildings, as vacant land, that it should have been valued together with its buildings and for the use and purposes for which it was then used, that the presence of such plants detracts from its market value as they must be torn down before any other use can be made of the property.

Fourth Exception. For that the said Master has found that the complainant is entitled to a return on the present value of its real estate, as distinguished from its original cost, that (p. 9) "By far the greater part of the real estate belonged to the constituent companies before the consolidation and was purchased many years ago at prices much below its present value" and on pages 27-28, that complainant was entitled to a fair return upon the amount of the increase in value of its real estate holdings or of the unearned increment thereof.

Whereas he should have found that the value on which the complainant was entitled to a return was such cost value to the six constituent companies up to consolidation and to the complainant since then for such land acquired since, less the amount received for sales of any real estate; that the difference between such cost and such present value represents the appreciation thereon, due to local conditions in Manhattan, and not to any increase in investment
524 by the complainant, and amounts to an unliquidated surplus which can be determined as soon as the property is sold, and both before and after such sale cannot be treated as other than a surplus, and it is not proper to allow a return thereon as against the consumer.

Fifth Exception. For that the said Master has found on page 26 as follows:

"There was no competent proof showing that the original cost of real estate was as stated only the sum of $4,118,267.38 and so far as the record discloses it is quite evident that the actual cost was in excess of that sum. Defendants' experts derived their information as to its original cost to the constituent companies and the appreciation on its transfer to the Consolidated Company from the report of Mr. Yalden, an expert accountant employed by the Senate Committee.

"On the face of their analysis no real estate is included as belonging to the Knickerbocker Gas Light Company and it appears from an examination of the report that the books of the Knickerbocker Company were not before Mr. Yalden.

"That it owned valuable real estate at that time does not appear to be questioned."

Whereas, said Master should have found that the sum of $4,118,267.38 did represent the cost of such real estate as carried in the books of the constituent companies; that the evidence shows that the real estate which became the property of the Knickerbocker Gas Light Company was purchased from the receivers of the Union Gas Company in May, 1878, for $2,000. That there were no books of account of the Knickerbocker Company, but that all cash was advanced by the estate of Mrs. Elizabeth Bayard, and the accounts were kept in the books of her estate, and that the works of said company were practically destroyed by fire, and on March 11, 1880, all
525 the stock of the Knickerbocker Company was purchased by the Municipal Gas Light Company for $350,000 in stock of the said Municipal Company at par.

That any omissions from said report and total would be substantially immaterial.

Sixth Exception. For that the said Master has found on page 26-27 as follows:

"In the second place, if the question of original cost is to be considered, it should be the cost to the complainant, the Consolidated Gas Company, and not the cost shown on the books of its constituent companies, some of which had acquired their property fifty years and more before the complainant was organized. The cost to the Consolidated Company was represented by the amount of stock it issued to the constituent companies for their real estate, which, as

already stated, was $10,332,000. It may possibly be that this amount was in excess of the fair market value of the property at that time, but the record indicates that the discrepancy, if any, was by no means as large as the defendants have argued.

In the majority report of the Senate Committee it is said:

'As to the value of the real estate, piers, property and water rights, there is a conflict of the testimony. It is a difficult question to determine owing to the varying opinions of real estate dealers.'

No specific finding was accordingly made on the subject, although the Committee reported that the aggregate value of the real estate and plants given as $29,994,000 was not too high.

The minority report recited that the Committee 'had caused every piece of real estate to be appraised by a disinterested witness and had subjected his results to reasonable tests from other witnesses
526 of large experience.' As a result it was stated that 'the scheduled values of the lots designated in the schedules as "real estate" are about 25 per cent. in excess of what was their fair value in September, 1884, when the agreement of consolidation was signed.' Such appraised value having been approximately $10,000,000, it is evident that, even on the basis of the Committee's Minority Report and in the aspect least favorable to the complainant, the original cost to it could from no point of view be considered at less than about $8,000,000."

Whereas he should have found that such value did not represent the true cost of the real estate on which if at all the complainant was entitled to a return, but that such cost was the original cost to the constituent companies of the real estate acquired before consolidation; and as to real estate acquired since consolidation the cost to the complainant. That by the mere act of consolidation in 1884 the complainant was not entitled to increase its real estate investment on which a return is demanded, without any additional outlay of cash.

Seventh Exception. For that the Master has allowed a return on the present value of the real estate of the complainant; whereas he should have found that where the taxes for such real estate are included in the cost of gas, and the complainant on the sale of such real estate will be able to realize a considerable surplus above the original investment therein, that said surplus represents an ample return thereon, inasmuch as it is customary in localities where such rises in real estate occur, for investors to hold real estate without return other than sufficient to pay taxes, relying merely on the profit made from such advances at the time of sale, and therefore complainant is not entitled to a return against the consumer on any real estate investment.

527 *a.* Land leased.

Eighth Exception. For that said Master on page 18 of his report finds:

"That the proper conduct of complainant's business required a large land area and when the property was originally acquired by complainant or its constituent companies, it can hardly be doubted that it was sound business policy to purchase these entire tracts, notwithstanding the whole area of each block purchased might not be

immediately required. Ordinary business prudence required the company to anticipate the growth of the company and the requirements of increased business. If odd lots occupied at the time by tenement houses, for instance, had been cut out they would detract from the value of the balance of the block and hamper the company in making such necessary extensions or additions as might from time to time be required. In plants as large as those of complainant it is inevitable that there should be here and there a small lot not covered at the moment with material or apparatus, but which, in view of the requirements of the business it would be extremely poor policy to sell. Its use may at any time be required. The company would not, of course, be justified in buying and holding real estate merely because of the fact that it was likely to enhance in value and irrespective of any necessity therefor in the business of gas making. On the other hand it seems clearly unreasonble to require that every plot of land owned by the company should be occupied to its utmost capacity and in constant use, in order that such property should be considered as part of the company's gas-making investment. In my judgment, none of the property in question can properly be regarded as unnecessary, under the circumstances. It may be pointed out further that the fact that these properties are rented as
528 above described, does not necessarily impose any additional burden upon the consumer of gas, notwithstanding their value is included with the assets of the company on which it is entitled to a return. The real estate rents appear as part of the miscellaneous income of the company and as will hereinafter appear, they are taken into account in determining the net profits of the company applicable to dividends."

Whereas the Master should have found that the parcels cited were not used by the complainant in the manufacture of gas (Francklyn, pp. 68, 69, 70).

That the sites are too valuable in New York to extend their existing plants (Bradley, p. 220).

That ordinary business prudence then did not require the holding of such real estate for extensions. That complainant already had considerable space and that the plants were greatly extended, and could, if necessary, be more advantageously constructed.

That by calculating from Complainant's Exhibit 48, as to area of the real estate and from pages 1351 and 5120 *et seq.*, as to areas of the plants, it appears that the output per square foot varies greatly in the different plants showing a more advantageous arrangement in some plants than others. That such difference is accounted for by the use of more modern and larger apparatus.

That lots not actually used by complainant in the manufacture could not be included in the investment on which a return was to be figured until such parcels were actually used; that only those actually and in constant and necessary use could be included.

That while it might be poor policy from an investment standpoint in view of the rapid rise of land values, to sell odd parcels not so occupied and in use, the value thereof should not be included in the gas making investment as against the consumer.

529 That the inclusion of these rented properties does impose an additional burden on the consumer notwithstanding the rents therefrom are included in the miscellaneous income of complainant, as such rents, according to the Master (pp. 16-17), amount to less than 6 per cent. on an investment of $268,250, and as the Master claims complainant is entitled to a 6 per cent. return, the consumer is prejudiced to the extent of the difference as well as the necessity of paying the taxes thereon, as included in the cost of gas.

That there should be deducted from the valuation of complainant's real estate upon which it is entitled to a return the sum of $268,250 allowed by the Master for said property.

b. Land Vacant.

Ninth Exception. For that the Master has found on p. 20 of this report as follows:

"Of the seven plots above described only two are wholly vacant. In view of their proximity to other property of the company, and in default of further evidence of unavailability than is shown by the record, I find that they may reasonably be considered as a proper part of its operating plant. In the single instance where the evidence gives no indication that the property is not used or intended to be used in some way in connection with the gas business, namely, the parcel on the south side of Fifteenth street, Block 972, the amount involved is not large. Its value, according to the witnesses for the City, is about $12,000. Under the circumstances and in view of the numerous uses to which property of this sort can properly be put for storage and other purposes by Complainant, I am not disposed to exclude it."

530 Whereas he should have found that these parcels were vacant and not used by the complainant in the gas business (Francklyn, pp. 71, 72, 76).

That the sites are too valuable in New York to use for extension of plants (Bradley, p. 220).

That calculations based on Complainant's Exhibit 48 as to area of land and testimony, pages 1351 *et seq.*, and 5120 *et seq.*, as to plants show that some of complainant's plants are more advantageously arranged on the basis of output per square foot than others; that land not actually and necessarily in use by the Complainant in the gas business cannot be included in the gas investment upon which a return is to be provided;

That in a locality like New York when land is so expensive the complainant is not justified in spreading over large areas or using ground areas only for storage when buildings with floors could be used and employ such areas to more efficient use.

That there should be deducted from the valuation of the real estate upon which the complainant is entitled to a return the sum of $745,155 allowed by the Master for said property.

c. Property not owned.

Tenth Exception. For that the said Master has found on page 21 of his report:

"It is not deemed necessary to consider the merits of the questions thus suggested. In one form or another they have been frequently

before the Courts of this State, but it can hardly be said that the proposition for which the City contends is so decisively settled for all purposes as to admit of no further question. However this may be, it is obvious that the question of complainant's title cannot be adjudicated in this action. For present purposes it is sufficient
531 if the property is occupied by complainant under a claim of title and used by it in connection with its business of gas making. This requirement is sufficiently met by the proof."

Whereas said Master should have found: that not sufficient evidence of title was presented by complainant as to the parcels considered under this division; that mere possession of such parcels is insufficient to acquire adverse possession as against The City of New York where the property has been reserved for street purposes; that no evidence was presented by complainant as to the ownership of blocks 715 and 716, not mentioned by the Master.

That the value of such parcels should not be included in the gas investment on which a return was to be provided; but that there should be deducted from the valuation of the real estate of the complainant upon which it is entitled to earn a return, the sum of $932,255 allowed by the Master for said property.

Eleventh Exception. For that the said Master has found on page 22 of his report as follows:

"It may be noted also that, even assuming the City's contention to be correct, it would not practically affect the issues involved in this action. Should the complainant be compelled to vacate the lots in question, upon which are located integral parts of its plants, it would obviously be compelled to acquire land of equivalent areas as nearly contiguous as possible. It may well be doubted, in view of the evidence, if such equivalent land could be obtained for a price as low as the appraised value of the land so vacated."

Whereas he should have found that if complainant were required to vacate such parcels it does not follow that similar areas would have to be acquired, as nearly contiguous as possible; that
532 complainant holds ample area already for such extension if required as appears from comparison of areas of land computed from Complainant's Exhibit 48 and of buildings computed from testimony, pp. 1351 *et seq.*, and 5120 *et seq.* That complainant furthermore has not exhausted its ability to extend up in the air by use of more modern apparatus. That other areas could, if necessary, be acquired for less than the appraised value.

d. Land unimproved.

Twelfth Exception. For that the said Master has found on page 23 of his report as follows:

"As to the remainder of the property in respect of which a deduction is claimed, part of which has already been considered under land leased, the only proof introduced by the City consisted of a statement showing its assessment for purposes of taxation for the year 1906 as vacant land. The mere description of a particular parcel as 'unimproved' or 'vacant' in an assessment roll is not sufficient foundation for the conclusion that the property is not used by complainant in its gas-making business. It may very well be, and the proof in

many instances showed, that the parcels assessed as vacant land were used for purposes necessary in connection with complainant's business, as, for example, the storage of coal, coke, pipe fittings, tools and castings."

Whereas the said Master should have found that the record showed that in addition to the said property being assessed only as unimproved land for the year 1906, that said property was vacant and not used by the complainant in the gas business, and not necessary for such purpose.

533 Block 690.

Francklyn, p. 69, shows five lots leased. State's Exhibit A, page 175, of Exhibits, shows ten lots in all that are unimproved.

Thompson, p. 2732, shows wagon yard on Marginal street, and Rowland, p. 183 of Exhibits, shows coal yards and pipe yards, which must be construed unnecessary now, as Eighteenth street is no longer an operating plant.

Mayer, p. 1378, describes coal yard fence, 520 feet, nine feet high—assuming this to be enclosed on four sides we would have a plot 130 feet square, which is considerably more than five lots 25 x 100.

Block 715—Lot 51.

State's Exhibit A, p. 175 of Exhibits, shows lot 51 unimproved.

Francklyn, p. 50, shows this block contains two gas holders.

Rowland, p. 184, describes gas holder building 188 x 92.

Mayer describes same building, 1378. Also wagon shed 21 x 28 x 15, timber covered with corrugated iron.

Complainant's Exhibit 48 shows this parcel as 92 feet deep by 225 feet long.

That one lot 25 by 92 is not required for holder and not occupied or used in the gas business at present.

Block 952, Lot 29.

State's Exhibit A shows this lot unimproved.

Block 987.

State's Exhibit A, p. 176 shows this entire block as unimproved.

534 In 1884, when this parcel was conveyed to complainant, it was part of Block 978, which, according to description, ran from Avenue A to East River (Complainant's Exhibit 19, p. 85, paragraph "Fifth").

Rowland, p. 217 of Exhibits, mentions

"*Enclosure east* of storage warehouse, wooden fences enclosing the property east of storage warehouses bounded by Twentieth street, East River and Twenty-first street."

Preiss, p. 1334, in giving his value thereto, adds nothing for improvements.

Thompson, p. 2736, describes it as vacant land, also McHale, p. 2925.

Block 1071, Lots 10, 11, 12 and 13.

State's Exhibit A, p. 176 of Exhibits, shows these lots as unimproved.

Complainant's Exhibit 48 shows parcel was conveyed by Henry Murray and wife to complainant July 7, 1898. Complainant's Exhibit 35, p. 221-2 of Exhibits, in describing the premises makes no mention of any building.

Thompson, p. 2736, and McHale, 2826, describes it as vacant.

Wheelock, p. 1111, and Preiss, 1335, add nothing for improvements.

Block 1683, Lot 18.

State's Exhibit A, p. 176, shows those lots as unimproved.

Thompson, p. 2740, and McHale, p. 2830, describe premises as "vacant with exception of small brick building in rear of lots facing on One Hundred and Eleventh street."

535 That there is no proof that such parcels were used in connection with the complainant's business for storage of coke, coal, pipe fittings, tools, castings, etc. That such use, together with the use of parcels for pasturing of horses, is not necessarily a proper use for unimproved real estate in Manhattan, in conjunction with complainant's gas business where such storage could be obtained on other portions of complainant's property actually and necessarily in use, or in properly constructed buildings making proper use of floor areas.

That the value of such parcels is not properly to be included in the gas investment on which the complainant demands a return; that there should be deducted from the valuation of the real property of complainant on which a return is allowed, the sum of $715,750 allowed by the Master for said property.

Thirteenth Exception. For that the Master in his report on page 115 has found:

"Whatever enhancement there may have been in its value since the date of purchase was the result of no efforts on the part of consumers of gas, and they are not equitably entitled to a return thereon. Whether it was the result of mere good fortune or was due to the shrewdness and foresight of the management of the company is immaterial; in either case, the justice of permitting the general public to share its benefits at the expense of complainant's stockholders is not apparent."

Whereas he should have found that whatever enhancement there may have been in its value since the date of purchase was the result of no efforts on the part of the complainant, but, according to complainant, p. 3819, due to "Divine Providence and the growth of The City of New York."

536 That the capitalization of the increased land value, and also of franchises and paving is not allowed either in Massachusetts or Great Britain (pp. 3024-3068).

That the complainant is not entitled to include such enhancement in the gas investment on which the consumer must provide a return, but that complainant may get the benefit of such enhanced value upon the sale of such property when it will be treated as a surplus entirely, and must be so treated prior to its liquidation. That to so do imposes no burden upon the complainant, as the taxes are paid by the consumer during the time the property is held.

That to do otherwise would be to impose a greater burden upon the consumer, which would in time enable even a dollar rate to be held confiscatory, since the investment on which the return is figured, would be continually enhancing.

II.—Plant.

Fourteenth Exception. For that the said Master has found on pages 37 and 38 as follows:

"In this instance, as well as regards the three items next to be considered, such reproductive cost affords the only practicable basis of present valuation. While the real estate has a substantial value irrespective of the purposes for which it is now held, the plants, mains, etc., are of value only when used by a going concern. For any other purpose they are merely scrap, or secondhand machinery, and their intrinsic worth is inappreciable. As to their market value, there is no means of judging. Dr. Marks, it is true, testified that his valuations were made from the standpoint of an intending purchaser desiring to take over the plants and operate them as a whole. But any such purchaser in order to continue business must own com-
plainant's franchises in addition to its tangible property, else
537 the tangible property would have no substantial value. (People *ex rel.* Consolidated Gas Co. *vs.* State Board, etc., 174 N. Y., 417, 440.)

"There is no evidence as to the market value of any of complainant's property taken in connection with its franchises, and disposed of as part of a going concern. Furthermore, it is clear that a valuation that might be proper as between purchaser and seller would not necessarily be a fair one for the purposes of the present case. The evidence shows without contradiction that capitalists purchasing entire gas properties expect a return on their investment of at least 10 or 15 per cent., which much exceeds any rate conceded by defendants to be a proper return to complainant. On the other hand, a capitalization on the basis of reproductive cost seems fair to all parties. Complainant receives a return on the present value of its property as used, while the consumer pays no more than he would be required to pay had complainant abandoned business, or a new company entered the field as its competitor."

Whereas he should have found that the only practicable basis of the present valuation (if such present valuation is to be taken) is the standpoint of the intending purchaser, and not the reproductive cost view, that the former is the fairer method, as between the parties,

as it does not enable the complainant to burden the consumer with increased cost for depreciated, old-fashioned or inadequate machinery, but gives such machinery a fair value only; that other franchises than the complainant's can be obtained from the proper authorities upon application, that nothing appears from the record that such a new franchise would require any original outlay; that no franchise would in fact be required for the manufacture, as distinguished from the distribution of gas; that a return on the present value of complainant's property as used, based on cost of
538 duplication, burdens consumer by requiring him to pay return on a value in excess of complainant's real investment, that such consumer would then pay more than if a competitor entered the field, as such competitor would not duplicate the antiquated and old-fashioned plants of complainant, but would construct an ideal plant to meet the given output; that the taking of duplication cost of complainant's plants as basis, imposes on the consumer all the burdens without giving any of the benefits of the competition theory.

Fifteenth Exception. For that the said Master has found that the complainant is entitled to a return on the present value of the plant, based on the cost of reproduction, and not on the original cost less depreciation, whereas he should have found that where such present value based on the original cost less depreciation, is less than the present value based on the reproduction cost, that the complainant is entitled to a return as against the consumer only on the smaller amount. Otherwise, the consumer is burdened with paying a return on money never spent, and deprived of benefits accruing from duplication by an ideal plant, while no injustice can accrue to complainant in allowing a return on its actual investment at its present condition.

Sixteenth Exception. For that the said Master has found, pages 36 and 37:

"I accordingly find and report the value of the complainant's plants to be substantially in accordance with the estimate of Mr. Meyer, a summary of which is given below but adopting, for purposes of convenience and to allow for possible over-valuation in some details, the round figure of $15,500,000 instead of $15,532,489, as shown by the appraisal.

539 *Valuations of Plants and Holder Stations, Depreciation Deducted.*

21st Street Plant including all Holders	$4,162,021 00
44th Street Plant including all Holders	2,000,205 00
99th Street Plant including all Holders	963,011 00
14th Street Plant including all Holders	2,549,545 00
42d Street Plant including all Holders	1,744,660 00
18th Street Plant including all Holders	588,873 00
Total for all Plants	$12,008,315 00

63d Street Holder Station complete	$490,072 00	
65th Street Holder Station complete	1,427,317 00	
111th Street Holder Station complete	1,039,910 00	
132d Street Holder Station complete	540,702 00	
Inwood Street Holder Station complete	26,173 00	
Total for all Holder Stations		3,524,174 00
Total for Plants and Holders now in use		15,532,489 00

"This may be fairly said to represent the cost of reproducing the property as it stands."

and has found, on page 29 P.:

"Of the above valuations that of Mr. Mayer is, in my judgment entitled to most weight and may be regarded as representing with substantial accuracy the present value of the property."

540 and on page 31:

"Making all allowances for any possible predisposition in favor of the complainant on the part of Mr. Meyer, in view of his past relations with the Company, his estimates are therefore on the whole, to be regarded as the most reliable. As hereafter pointed out, they were corroborated in many particulars by the Defendants' own witnesses, and, although subjected to careful examination by the latter and a full cross-examination by counsel, no errors became apparent which would materially affect the general result of his computations."

—and on page 139 has carried such figures of $15,500,000 into the total on which a return is to be allowed;

Whereas he should have found that the present value of said plants was more nearly the figures of Defendants' witnesses, to wit, $9,348,-692.00; that the testimony of Mayer was not entitled to the most weight, that his figures were excessive and his basis erroneous in many respects, which materially affected his general result; that Mayer included piling where none existed, but, where from nature of ground, he deemed they should have been (p. 6576); that Marks and Edgerton relying on Mayer's schedule, included piling wherever he stated (State's Ex., P. P. P.) and that Mayer in his testimony also included piling where according to Rowland none existed, nor shown in Mayer's schedules (Compl. Ex. 70).

That Marks made allowances for piling and other expensive foundations wherever they existed (pp. 5251, 5256, 5266).

That the correct and accepted method for ascertaining the cost of construction is by a calculation of the quantities of materials involved and applying thereto the cost of such material, including labor and

builders' profit, due allowance being made for engineering, and interest on capital during the period of construction such as
541 shown in Defendants' Exhibit P. P. P. in detail for buildings and brick tanks and in the summary of the same (pp. 5116-5238).

That the method adopted by Mr. Meyer of estimating by comparison is erroneous.

(*a*) Buildings.

That Mayer's figures for cubical contents were excessive and erroneous; that his results in some instances were even more than Rowland's, made for the same building in 1884; that Mayer's basis was the buildings of the Kings County Gas and Illuminating Company, and that there is no evidence showing such buildings were similar to complainant's.

On page 6687 Mayer values 9 sheds at Twenty-first street station at $725,652, as against Rowland's $246,349 (Complainant's Exhibit 70); and to a brick and brownstone building enclosing two holders at Eighteenth street he gives a value of $179,151, against Rowland's $45,250.

The estimates of Mr. Edgerton in regard to buildings were only gone into in detail with reference to two buildings; the Governor and Boiler house, One Hundred and Thirty-second street, involving about $21,000 construction, and the generator houses at Twenty-first street valued at $129,000 new. In regard to one item there was an apparent error; brick had been taken at $14 per thousand, which was the unit price for the poorest class of brickwork instead of $21 for the highest class. With this exception there was none of the errors attributed by the Master on page 32 of the findings, as to piling omitted, foundations omitted, prices based upon cost of materials without including profit, or materials below market prices. On the contrary, the details of the estimate conclusively show that nothing was omitted that was contained in Mr. Meyer's schedules of buildings and holder tanks; but on the contrary additions were made to
542 cost of materials and labor, in many cases to the extent of twenty per cent. wherever the insufficiencies of Mr. Meyer's schedules failed to give sufficient data or there was reason to estimate on a superior construction to that defined in the schedules.

(*b*) Holders and Apparatus.

Meyer's figures were excessive, and his method was erroneous; his figures in Exhibit 376 were not "exact" shipping weights, but merely estimated or calculated weights from the dimensions taken;

That the correct method was adopted by Edgerton and was finally acknowledged by Meyer as correct (pp. 6731, 142);

That Meyer's method of comparison with similar holders (p. 6730) constructed by Bartlett, Hayward & Co., was misleading as the weights of holders have been increased in recent years, thus duplicating holders at an exaggerated weight and of a size the complainant had ceased duplicating in practice for over thirty years;

That Meyer's appraisal of the plant taken in July and August, 1906, rather than December 31, 1905, enabled the claiming of apparatus dismantled and laid aside, as apparatus merely not in use owing to small summer demand;

That Meyer applied to some of the holder construction the cost of the most expensive part, thereby increasing the cost of the least expensive part (pp. 1596-7; Compl. Ex. 376, pp. 2553-78);

That Meyer admits it costs less to-day to build benches than it did in 1884, and yet gives a greater value for same than Rowland (p. 1411) (290 and 1497).

543 (*c*) Yard Connections.

That Meyer's figures here are erroneous (pp. 1359-64); in estimating for Fourteenth street and Forty-second street he finds present value of $281,052, which with 10 per cent. and 5 per cent. added makes $324,614—a cost per 1,000 cubic feet of capacity of $34.17, as against estimated Astoria cost of $3.50 (Addicks, p. 1871), $4.36 as revised. (State's Ex. V.)

For Forty-fourth, Twenty-first and Ninety-ninth street his figures are $431,229, which with daily capacity of 38,000,000 equals $11.35 per 1,000 cubic feet.

That Meyer has included a great duplication of pipes due to changes and enlargements.

Engineering.

That the figure of 10 per cent. adopted by Meyer is excessive by at least 7 per cent. (pp. 5119-5181, 5204, 5387-91).

That Edgerton's figure in this respect, 3 per cent., was more nearly correct, and did not contain such contingencies of grading, paving, curbing, sewerage, etc., which were charged as separate items (pp. 5132-48 *et seq.*).

That the item of 10 per cent. for such engineering and contingent expenses is not justified where an inventory is made by engineers of buildings and apparatus already erected and in operation.

No such additions were made in Rowland's inventory. (Complainant's Ex. 70.)

Depreciation.

That the figure of $604,988 for depreciation adopted by Meyer was too low, being less than 4 per cent.; that it did not include obsolescence or inadequacy but merely wear and tear; that Marks'
544 average depreciation, 21 per cent. (p. 6697), was more accurate; that the plants were inadequate and obsolete in many respects and not as a whole in efficient operating condition; the total insurance carried by the complainant on buildings and holders was but $7,390,722 (City's Ex. 87, p. 1543); that the difference between the book value and the tax value of Bradley stated on p. 98 of the report represents depreciation.

That on page 36, fol. 144, Mr. Edgerton's method is commended

by the Master, and his only criticism thereof is on page 35, as follows:

"The examination made by Mr. Edgerton was of such a cursory nature that his figures for depreciation were necessarily made less carefully. In one case, for instance, he ascribed the same depreciation, 10 per cent., to new apparatus installed in 1904-5 as to old apparatus installed 15 or 16 years earlier."

The Master finds such a figure for depreciation anomalous, peculiar and the result of cursory observation; whereas he should have found that a correct and careful estimate of depreciation on Lowe apparatus, to which the Master's remarks referred (p. 5980, testimony of Vice-President Addicks) should be based upon the condition of the apparatus, whether relatively new or old. A new machine of the Lowe water gas type has just as frequent shut-downs for repairs as an old one, and is just as liable to derangement. This is clearly indicated in the City's Exhibits showing the performance of the complainant's apparatus; in the testimony of Mr. Addicks, page 1774, "Yes, but water gas generators are very apt to break down and you must have some to spare for that purpose." On pp. 6055-6056 Mr. Addicks states in effect that a machine in action has depreciation accruing which will not appear in repairs until the repairs are made.

545 While a cursory study of the testimony and exhibits would not disclose these facts, they lie quite near the surface.

A fair depreciation factor in a going concern would be the amount it falls short of its fairly rated capacity during such time as there is urgent demand for its maximum output.

The Fourteenth street plant was in a dilapidated condition (p. 4661).

The eight small holders were out of use (pp. 4659-60) during the time of maximum output.

The direct fire benches at Fourteenth street produce results inferior to works erected many years ago (p. 4646).

The water gas stations (City's Ex. 87, pp. 1503-10) were short of their rated capacity from 33 to 50 per cent. during the heavy months of January and December.

Seventeenth Exception. For that the said Master in finding $15,500,000 as the value of the plant and holder stations as set forth in the exceptions has included therein.

I.—In the value of the Eighteenth street plant to the amount of $453,695 as the reproduction value of dismantled and abandoned manufacturing plant which is not now in use in the gas business.

II.—In the value of the One Hundred and Eleventh street holder station the amount of $428,019 as the reproduction value of dismantled and abandoned manufacturing plant not now used in the gas business.

III.—In the value of the Inwood holder station the amount of $26,173 for the reproduction value of abandoned plant, which is not now used in the gas business.

IV.—In the value of the Fourteenth street station the reproduction value of holders not used is included.

546 Whereas he should have deducted such values from the amount allowed by him, as such property is no longer in use.

III.—Mains.

Eighteenth Exception. For that the said Master in his report on pages 38, 39 and 40, has found the value of the mains of the complainant on which it is entitled to a return as against the consumer, to be the replacement value based on the cost of reproduction of the same.

Whereas said Master should have found said value of the mains to be the actual cost of investment therein by the complainant, less the depreciation, as the only fair basis between the complainant and the consumer, otherwise the consumer is charged with the burden of providing a return on an amount in excess of the actual investment of the complainant due to increased cost resulting from modern conditions, pavements, etc., without the consumer receiving the benefits which replacement, at the present time, under the present conditions, would give. That in no sense can the mains of the complainant, many of which have been in the ground for fifty years, be said to be at the present time of a greater value than the actual cost, merely because modern conditions would not permit duplication of such identical mains at the same cost at the present time.

Nineteenth Exception. For that the said Master in his report on pp. 38, 39, 40 and 139 finds the present value of 822 miles of mains at $12,636,000 based on the cost of reproduction thereof as specified to by Mr. Simpson, and rejects the testimony of Mr. Marks of $6,529,035 and Mr. Edgerton of $8,919,792.55, and on page 40 finds:

"Taking the testimony on this subject as a whole, the preponderance of evidence is very clearly with the complainant, and its estimate of the replacement value of the mains may be taken as reasonable."

547 Whereas said Master should have found said reproduction value was not greater than the highest figure of defendant's witnesses and that the figures of complainant's witnesses were excessive; that Mr. Simpson's testimony was inaccurate in many respects; that the total mileage was only 795.47 in place of 822 claimed; that he used an excessive price per ton for iron for 1906, instead of for 1905, and used an excessive price for excavation.

That at least 25 per cent. depreciation for inadequacy and obsolescence should be allowed, as found in tax reports on page 99, that the system of mains as existing today is inadequate, that the increase in mileage in 1905 over 1884 is only 16 per cent., that the increase in capacity of said mains during said period is a little over 100 per cent., while the increase in output is 330 per cent., that over 50 per cent. of its mains are six inches or less, and 17 per cent. four inches or less, none of which latter sizes are now laid.

Twentieth Exception. For that the said Master, in his report at pages 41 and 42 has refused to find that the appraisal value of both mains and services at the time of consolidation in 1884, was far in excess of their cost; and that the value of mains and services de-

voted by complainant to the public use were as of December 31, 1905, $6,359,324.46, which represents the original cost of mains and services transferred by the constituent companies to the complainant plus the expenditures of the complainant since 1884 on account of new construction thereof.

Whereas he should have found that such figures represented the then value of such mains and services on the basis of cost less depreciation, as carried on the books of the constituent companies, and that any figure in excess of such amount which the complainant claimed therefor at that time was in excess of the real value of such mains and services and such excess should not be included
548 in the investment on which a return is to be allowed, for the reason that it does not represent a cash outlay by the complainant, and any capital stock issued for such excess by complainant was unwisely and wastefully issued.

Twenty-first Exception. For that the Master has refused to find (p. 191) that owing to the consolidation of the six constituent companies in 1884, forming the complainant, there exists to-day considerable duplication of mains in the streets of the City, which would not have existed had not these companies attempted to consolidate, and that the consumer should not be required to provide a return on the value of this duplication.

IV.—Services.

Twenty-second Exception. For that the said Master on page 41 of his report, found that the complainant is entitled to a return from the consumer on an amount for services based on the cost of reproduction at present prices; whereas he should have found that if the basis of present value is to be taken, no amount at all could be charged by the complainant, as such services are no longer owned by such complainant, inasmuch as so much thereof as are in the public streets are considered as separate from the franchises, and the balance thereof as is on private property belonged to the owner of said property, and that it is only when the basis of actual cost, less depreciation, is adopted that any amount for services can be included by the complainant in the amount on which a return is to be provided by the consumer.

Twenty-third Exception. For that the said Master on pages 41 and 139, has fixed the value of the services on which the complainant is entitled to a return at $1,994,000, that such amount is based on the cost of reproduction and is excessive in that it capitalizes pavements and allows no depreciation, that complainant has claimed such services depreciate to the extent of 25 per cent. (p. 99 of Report), that the proper present valuation is the cost less de-
549 preciation, and such value does not exceed $1,222,228.37, as shown on the books on December 31, 1905.

V.—Meters and Miscellaneous Personal Property.

Twenty-fourth Exception. For that the said Master in his report, on page 42 thereof, finds that the amount which the complainant is

entitled to a return on as against the consumer for meters and miscellaneous personal property is based on the reproduction value thereof at $4,100,000, adopting the estimate of Mr. Carter; and on p. 139 he carries such figures into the total.

Whereas he should have found that such reproduction value was excessive; that such reproduction value is not a fair basis, as between the plaintiff and the consumer, in that it burdens the consumer with providing returns on an increase over the actual investment of the complainant, which increase is due to modern conditions, without allowing the consumer any benefits which reproduction by an ideal plant at the present time would give; that the only fair method between complainant and the consumer of determining the present value is to take the actual investment of complainant less depreciation, and such value should not exceed the figures of $3,261,687.

VI.—Working Capital.

Twenty-fifth Exception. For that the said Master on page 44 has found that a much larger working capital is now required than that conceded by the City and that nothing is found in the evidence to justify the conclusion that the sum of $3,616,000 claimed by the complainant is excessive.

Whereas he should have found that the amount of $2,000,000 included in said sum of $3,616,000, being the amount of accounts receivable outstanding, should not be included therein.

550 VII.—National Coal and Coke Company.

Twenty-sixth Exception. For that the said Master, on page 44 of his report, has found that as the carting of coke is a necessary incident to the disposition of one of the complainant's residuals, there is apparently no reason why the amount invested as above ($50,000) should not be regarded as part of complainant's capital on which it is entitled to a return.

Whereas, the Master should have found that the complainant was not entitled to include said amount in its capital; that said business is a separate and distinct business run by a separate corporation and that its inclusion is prejudicial to the consumer.

VIII.—Astoria Plant.

Twenty-seventh Exception. For that the said Master has found on pages 52 and 139 of his report that item No. 8 as claimed by the complainant, amounting to $12,000,000, for Astoria, should be allowed to be included by the complainant in its assets on which it is entitled to a return and should be designated as "property of other companies employed in the production of gas delivered by them to the complainant," and that on page 51 the Master finds "obviously, however, it must be taken into account in some form, for the complainant is quite as much entitled to a return upon its capital employed in the purchase and distribution of gas made by some outside

company as on the capital employed in the manufacture of gas at its own works."

Whereas, he should have found that such amount should not have been allowed at all; that the capacity of the complainant's works was sufficient to manufacture all of the gas bought from other companies during the year 1905 if the complainant had deemed it for its best interests so to do rather than to purchase such gas, unless it be held that such plants were in greatly depreciated state
551 and incapable of approaching their maximum output. That while from the stockholders' standpoint the complainant might be justified in buying gas where it could be done cheaper than by manufacturing it at its own plants, it cannot burden the consumer by increasing the gas investment on which it claims a return to the extent of the capital necessary to make the gas bought. That where complainant's output was sufficient to cover the total consumption, any attempt to include in the gas investment the capital necessary to produce the gas bought would be equivalent to a duplication to that extent of the complainant's investment as against the consumer.

Twenty-eighth Exception. For that the said Master in his report on page 48 has found that the complainant's claim of $12,000,000 for the allowance of the Astoria investment is not excessive.

Whereas, he should have found such figure was excessive. That if such investment was to be allowed at all it should not exceed the figure of $5,096,000, as shown by Dr. Marks, or the figure of $3,836,000, as set forth in this defendant's amendments, pages 200 to 204, and disallowed by the Master. That the testimony of Professor Bemis shows that it does not cost as much to increase the capacity of a works by 3,000,000,000 cubic feet per annum as to build a complete works for such additional amount. That the complainant, holding so much vacant leased and unimproved real estate in the Island of Manhattan to provide for future contingencies, is not justified in claiming the value of this new investment until it has shown that extension on its existing properties is impossible.

Twenty-ninth Exception. For that the said Master finds on page 51 of his report the maximum daily output of the complainant during the year 1905 is about 70,000,000 cubic feet.

Whereas, he should have found that such maximum output did not exceed 51,000,000 cubic feet, as can be shown in detail by computation from the testimony.

552 *Thirtieth Exception.* For that the said Master has found that the maximum daily capacity of the complainant's plants was but 51,000,000 cubic feet.

Whereas he should have found such maximum daily capacity was at least 58,500,000 cubic feet as appears from the calculations based on complainant's exhibits.

Thirty-first Exception. For that the said Master on page 61 of his report has found that the 20 per cent. reserve of the complainant's manufacturing capacity is necessary in a large city like New York, and that the complainant to cover such reserve was justified in buying gas from other companies.

Whereas he should have found that ample reserve capacity existed in the complainant's works at the present time as shown from their own exhibits unless complainant's plants must be admitted to be in a greatly depreciated state and incapable of approaching their maximum output.

IX.—Franchises.

First. As to complainant's ownership of existing franchises.

Thirty-second Exception. For that the said Master in his report on page 65 has found that the Statute of 1884 under which the complainant was organized, cured defects in the franchise of the Harlem Gas Light Company.

Whereas he should have found that said act did not authorize nor apply to the consolidation effected by the complainant or in any manner revive or validate franchises of the six constituent companies.

Thirty-third Exception. For that said Master has found on pages 52 to 73 that complainant at the time of enactment of the statutes and the making of the order complained of, owned, by virtue
553 of the consolidation whereby complainant was consolidated and devoted to public use, franchises to carry on a gas business in The City of New York and to use the streets, avenues and public places thereof for that purpose as follows: The franchise granted to the New York Gas Light Company; The Manhattan Gas Light Company; The Metropolitan Gas Light Company; the Municipal Gas Light Company.

Whereas he should have found that at the times aforesaid the said franchises, rights and privileges formerly conferred thereby had ceased, terminated and expired.

Thirty-fourth Exception. For that said Master has found that complainant was the owner by virtue of the consolidation whereby it was created, of the franchises to carry on a gas business in The City of New York, and to use the streets, avenues and public places thereof for that purpose claimed by the Knickerbocker Company by and under chapter 944 of the Laws of 1871, and on page 63 has found that the objections to the Knickerbocker Gas Light Company franchise under chapter 944 of the Laws of 1871, and by assignment from the Anthracite Company, are technical and many of them could obviously be cured.

Whereas said Master should have found that the said Knickerbocker Company never owned or had the legal title to the franchises, if any, conferred thereby and that complainant never held or owned and has never been entitled to and is not now entitled to use the same, and that such assignments not having been recorded and not having seen the light of day since their execution until this action was brought, that all objections and irregularities noted, or the great majority of them, were important and material, and at least until such defects were cured or explained the records relied on had no probative force whatever.

Thirty-fifth Exception. For that the said Master has found that

the said complainant owned by virtue of the consolidation
554 whereby it was created, the franchises to carry on the gas business in The City of New York and to use the streets, avenues and public places thereof for that purpose, granted to the Harlem Gas Light Company and that the same was an assignable franchise in perpetuity at the time of the enactment of the statutes and the making of the order complained of, property of the complainant devoted by it to public use.

Whereas he should have found that the said franchise granted to the Harlem Gas Light Company ceased and expired on May 26, 1905, and were not at the dates aforesaid property devoted by the complainant to public use.

Thirty-sixth Exception. For that the said Master on page 63 of his report finds that under the Charter of The City of New York the municipal authorities have been permitted to grant franchises only on condition requiring a substantial return to the City.

Whereas said finding is not justified as there is no evidence in the record to support the same.

Thirty-seventh Exception. For that the said Master in his report on pages 63, 70 and 71 finds as follows:

(Page 93.) "In short, so far as the present record shows, the municipal authorities have fully acquiesced in the continued use and occupation of the streets by complainant.

"These considerations would appear to be sufficient for the purposes of the present case, and render unnecessary a discussion of the elaborate arguments submitted by counsel."

(Pp. 70 and 71.) "Having in mind the distinction drawn in the foregoing decision between the consent necessary to confer a franchise and the mere administrative function of regulating the details of opening the streets, there would seem to be little question
555 as to the validity of the rights now enjoyed by the older constituent companies: The consents to occupy the streets were given in the case of the New York and Manhattan Companies by the grants, and in the case of the Metropolitan Company by the resolution of the Common Council, above recited. It is true that such consent was in each case for a limited period, but, in view of the acquiescence of the municipality in the continued use and occupation of the streets for many years after the expiration of such periods, each company can now claim that it has, as the Court said, 'a perpetual and indefeasible interest in the land constituting the streets' of the municipality. The only right that remains in the municipality is that of controlling, through its proper administrative officers, the details of opening such streets. In other words, the municipal authorities having, whether by formal consent or by acquiescence, assented to the 'digging into' of the streets for the laying of the mains, have exhausted their power, excepting as to the matters of police regulation involved in the opening of street surfaces for repairs and the like. In view of the time that has elapsed since the expiration of the original grant—in the case of the New York Company over fifty years, during which time the company has continued to supply gas to the public in accordance with its charter—it would

seem that the municipality is certainly estopped from asserting a position inconsistent with its own practical construction of the effect of the original grant. I have been referred to no authority precisely in point, but the trend of the decisions supports the views above expressed."

Whereas, said Master should have found that the complainant cannot and has not gained any franchise by any omission of the City or by adverse possession, nor is the City estopped by any
556 acquiescence on its part in the unlawful use of the streets.

That the City, though the largest single consumer of the complainant, does not represent all the consumers, and that the remainder of such consumers should not be prejudiced by any acquiescence or omission of the City.

Second. Complainant's Right to a Return.

Thirty-eighth Exception. For that the said Master on page 73 of his report has reached the conclusion that the complainant having valid existing franchises, such franchises constitute such property as is properly included among the assets upon the value of which complainant is entitled to a return;

Whereas he should have found that even if such franchises were valid and existing, they did not constitute property properly included among the assets upon which complainant is entitled to a return. That there is no evidence in the record showing the original cost of such franchises to the complainant, and that in the absence of the sum originally invested therein, whatever value such franchises may have at the present time is entirely a resultant value depending on the possibilities of the business which the franchise covers. That the greater profits the complainant can make in such business the greater becomes the value of the franchise. That as the value of the franchise depends upon the profits and therefore upon the rate, any change in the rate affecting the profits must affect the value of the franchise, and therefore to include the present value of the franchise in the assets on which a return is to be allowed in fixing a rate, is to reason in a circle and to enable the complainant to lift itself up by its boot straps, *i. e.*, the higher the rate the higher the value of the franchise, and as the complainant claims the higher the value of the franchise the greater must be the rate to allow a return thereon. That in time, under such conditions, with only the normal increase in business augmenting the value of the franchise, any rate would become confiscatory and rate regulation impossible.

557 *Third. Value of the Franchises.*

Thirty-ninth Exception. For that the said Master in his report under this head has included in the property on which the complainant is entitled to a return the present value of its franchises;

Whereas he should have allowed only the actual investment

therein or cost thereof and that there is no proof of such cost to complainant as is more fully stated in the previous exception.

Fortieth Exception. For that the said Master has allowed for franchises and good will the figure of $20,000,000 as the present value thereof, based on the receipts for the year 1905, whereas such value was excessive in that it was based on a year when the rate of $1 per thousand feet of gas was in force.

X.—Good Will.

Forty-first Exception. For that the said Master on page 90 of his report finds that "It is clear, however, that each (good will and franchise) is of substantial value and contributes very materially to the complainant's earning capacity."

Whereas he should have found that good will may be considered as of some value in cases of condemnation sale or taxation, and that the same should not be considered in a proceeding to determine the property on which the complainant is entitled to a return when a rate has been fixed, for substantially the same reasons set forth in the exceptions to the inclusion of the present value of the franchises. Furthermore, good will as to a monopoly is impossible of definition other than the expense of getting the business started, that is of initiating a going concern. That such expense is covered under the head of working capital. The usual and accepted definition of good will applying to ordinary trade ceases where a monopoly
558 is concerned, as the consumer has no alternative but to deal with the monopoly.

Forty-second Exception. For that the said Master in his report on page 92 thereof finds that the average price of complainant's stock in the year 1899 was 193; that at such rate the complainant's then capital of $39,078,000 would represent a valuation of $75,420,540; that the average between 1885 and 1899 was 155.8, which for the entire capital would amount to $60,883,000, and that tested by this standard the present valuation of $63,357,000 for the complainant's assets, exclusive of franchises and good will, would appear to be conservative;

Whereas the said Master should have found that such comparison was inaccurate in that it is manifest that the market price of the complainant's stock includes the value of its earning capacity and unexpended surplus.

Forty-third Exception. For that the said Master on page 99 in considering the figures in complainant's tax reports has failed to give proper weight to same as disqualifying the figures of said witnesses given elsewhere on the same property.

Cost of Gas.

Forty-fourth Exception. For that the said Master on pages 123-4 has found as follows:

"After careful consideration of the evidence I have reached the conclusion that a fair computation of cost is as follows:

Cost per thousand cubic feet of sale, as per Exhibit 94			74.81c.
Deduct:			
Item 69, fixed charges	7.32c.		
From Item 66, taxes computed on excess dividends paid on stock invested in securities of other lighting companies	.48c.		
Item 54, interest on consumers' deposits		.39.	
There should also be a deduction from Item 43, cost of gas manufactured under agency agreement representing the 10 per cent. in excess of the cost of gas paid by complainant to the subsidiary companies; this was deducted only by the witness, Hall, and represents an expense per thousand cubic feet of	1.08c.		
Less, however, an allowance for proportionate station and distributing expense in connection with the gas so bought of	.30c.		
Making a net deduction of		.78c.	
			8.97c.
Net total			65.84c."

560 and on pages 139-140 he finds as follows:

The net earnings for the year 1905, adjusted in accordance with the views already expressed, were $4,983,928.31, arrived at as follows:

Gas sales			$13,552,482 97
Miscellaneous income			172,710 53
National Coke & Coal dividend			5,000 00
Total			$13,730,193 50
Operating expenses (as per Exhibit 94)		$9,936,910 42	
Less—			
Fixed charges	$972,423 44		
Interest on consumers' deposits	51,391 52		
Taxes not applicable to gas business on earnings	$5,257 48		
On dividends	57,965 39		
	63,222 87		
Premium paid for gas manufactured under agency agreements, 13,283,000,000 cubic feet at .78 cents	103,607 40		
		1,190,645 23	
			8,746,265 19
Net earnings			$4,983,958 31"

and on page 149, complainant's amendment X as allowed:

"The above expenses, $8,746,265.19 represent the 65.84c. per thousand feet of gas sold in 1905 as above found; and accordingly include no allowance to bring current repairs and renewals up to the average of the company's previous experience, or for final renewals or reserve fund, or for actual increase in cost of enrichment or taxes or labor, or for renewals and depreciation on property
561 employed outside complainant's plants in production of gas sold by it, except to the extent hereinbefore stated."

Whereas, said Master should have found that such cost of gas more nearly approximates the figures of defendant's witnesses, and is in the vicinity of 52.50 cents with the deductions made as hereinafter claimed in exceptions numbered forty-fifth to fifty-third, inclusive. That said 52.50 cents represents an expense of $6,922,738.35 which deducted from the total receipts of $13,730,193.50 leaves net earnings of $6,807,455.15.

Forty-fifth Exception. For that the said Master has allowed the complainant to include in its Cost of Gas Item No. 47, Repairs to Gas Stoves, amounting to $55,954.35, whereas said Master should have found that such item forms no proper part of the cost of the complainant's gas and should not be included therein; and further that as complainant receives a rental from its gas stoves of $67,367.62 the repairs to said gas stoves amounting to $55,954.35, deducted therefrom, would leave a net income of $11,413.27.

Forty-sixth Exception. For that the said Master on pages 102-3 has allowed complainant to include in the cost of its Gas Item No. 53, Street Lamps, amounting to the sum of $289,259.09, whereas the Master should have found that such item forms no proper part of the cost of complainant's gas, and should be excluded therefrom.

Forty-seventh Exception. For that the said Master on pages 103-4 of his Report, has allowed the complainant to include in the cost of Gas Item No. 58, General Office Expense, amounting to $25,671.74 and Item No. 61, Advertising and Legal Expenses, $63,401.65, whereas said Master should have found that such items were exceptional and unusual; that they were not apt to recur regularly; that to include the same in the cost of gas would be prejudicial to
562 consumers in the future; that such expenses would not recur; and that the same form no proper part of the cost of gas, and should be excluded therefrom.

Forty-eighth Exception. For that the said Master, on page 104 of his Report has included in the Cost of Complainant's Gas, Item No. 62, Real Estate Rents, amounting to the sum of $42,674.71; whereas he should have found that there was no evidence tending to show that the property so rented was necessarily used in the business of making and distributing gas; that such item formed no proper part of and should not be included in such cost.

Forty-ninth Exception. For that the said Master, on pages 104-5 of his Report has included in the cost of complainant's gas the following portions of Item No. 66, designated Taxes:

A. Taxes on $41,356,409.86 stock in gas business.....	$62,034.61
B. Interest on unpaid taxes.....	94,506.29

whereas, he should have found that such amounts did not represent expenses likely to recur in future periods, and to include them in the cost of gas herein would be prejudicial to consumers in the future; that the same form no proper part of the cost of gas and should be excluded therefrom.

Fiftieth Exception. For that the said Master has included in the cost of gas in Item 66, taxes on special franchises to the amount of $406,909.23,

Whereas such amount has not yet been paid, is being litigated and may never be paid, is based on a value predicated on a rate of $1.00 per thousand feet of gas; that such tax was intended to reach the surplus earning capacity of the business after a fair return is provided (p. 81 of Report, fol. 323) and therefore to burden
563 the stockholders not the consumer, that a fixed rate is not required to produce a surplus net earning to be not confiscatory and not producing such, no taxable basis would be provided.

Fifty-first Exception. For that the said Master has failed to deduct from the cost of gas the amount of the taxes on real estate held by the complainant but not used in the gas business,

Whereas such amount should be deducted from the cost of gas in the same manner as the value of such real estate is deducted from investment.

Fifty-second Exception. For that the Master has neglected to deduct from the apparent price of gas the sum of 3.6 cents, as claimed in defendant's amendment No. 16, p. 198.

Fifty-third Exception. For that the said Master on pages 124, 125 and 126 of his report with regard to Item No. 67, contingent expenses, including renewals, amounting to $1,328,316.37, has found as follows:

"I am satisfied that the charge of 10 cents per thousand feet for "Contingent Expenses," including renewals and replacements, as shown by Item 67, is not excessive but, on the other hand, rather conservative. I have not deemed it necessary to differentiate between the amount to be allowed for final renewals and for contingencies, nor to determine that any fixed amount should be added to the current expenditures for repairs and renewals to bring them up to the average of former years. It is sufficient to say on this subject that the annual expenses for repairs and renewals has been very considerably less per thousand feet since the year 1900 than during the period between 1884 and 1889, inclusive. The renewals for 1903 were $237,576.96, as against $282,219.67 for 1905. With this single exception, the renewal charges for the five years
564 from 1900 to 1904, inclusive, were very considerably larger than for the year 1905. The testimony as to amount of depreciation now observable in the plants, or for which allowance should be made in appraising their value, indicates with reasonable certainty that the annual expense for renewals and replacements is likely to be over, rather than under, the 2.12 cents per thousand of the year 1905. This takes into account no extraordinary charge due to abandonment or "scrapping" of plant in consequence of anticipated removal at some later date to Astoria.

"As regards the elements to be taken into account in fixing a proper amount of reserve for contingencies, the direct testimony was confined chiefly to the matter of electrolysis. That this is a danger which may be reasonably apprehended is evident from the fact that it has received very considerable attention from electrical experts throughout the country, and has been made the subject of special investigations on behalf of interests having capital invested in subsurface construction. No special damage has been shown to have thus far resulted in this City, and the evidence indicates that all possible precautions are being taken to prevent it and with a reasonable assurance of success. In view, however, of the increasing number of electrical installations now in progress in this City, with currents of unusual power, it cannot be wholly disregarded. The danger of explosions is more immediate. Experience has shown that such catastrophes are not at all uncommon in the experience of this and other companies and may occur entirely without fault of the companies' servants. Under existing conditions, the chance of their occurrence is likely to increase rather than decrease. It is also apparent that, in view of the increasing number of subsurface structures in New York City, the expenses to which complainant
565 must be subject in the care and maintenance of its mains and connections are likely to increase, and this fact in connection with the continued rise in the price of labor and materials, indicates strongly the necessity in prudent corporate management for maintaining a reserve in excess of the actual expenditures called for by known requirements."

Whereas he should have found that such charge of 10 cents a thousand cubic feet for contingent expenses was excessive and not a proper amount to be included in the cost of gas; that as to the element (1) final renewals, it represents a recharge for depreciation of plant which is improper unless there is taken into consideration a similar depreciation of complainant's plants from the time of its consolidation in 1884, which wasn't done on the books of the complainant, and which, had it been done, it would have reduced the value of complainant's present investments considerably, or would have provided a sinking fund of ample proportions to cover any such contingencies at the present time; that complainant not having seen fit to keep its surplus unimpaired but having preferred to conceal the same or pay the same out for dividends or to tie the same up with its real estate holdings or to expend it for construction or for the suppression of competition is not justified in burdening the present consumer with such an excessive charge to cover possibilities of final renewals. As to the element (2) reserve fund, the danger from electrolysis is remote; that complainant's witnesses state the mains to be in absolutely perfect condition today notwithstanding the fact that electricity has been in use for a number of years; that as to explosions the danger is remote—the instance of the Boston Subway explosion not being shown to have been a necessary result, but apparently due to the gas company's neglect (Testimony, p. 3021); that such single instance, the only one cited in the record, does not justify

its perpetuation by a provision being made in the cost of gas
566 to cover similar possible contingencies; that such item is excessive and should not be included as an element in the cost of gas.

Suggested Economies.

Fifty-fourth Exception. For that the Master at pages 126, 127, 128 and 129, under the heading of Suggested Economies, has refused to allow any reduction in the cost of gas to complainant under the several headings there set forth, and has disregarded other headings suggested by defendant, and on page 150, has allowed and found complainant's amendment XII, reading in part as follows:

"Nor is there any satisfactory evidence that any of the expenditures of the complainant for material, labor, or otherwise in the manufacture and distribution of gas have been improper, unnecessary or unreasonable."

Whereas he should have found as follows:

Oil.—That the cost of gas to complainant is increased unnecessarily by injudicious use and purchase of oil; that it is unnecessary for the complainant to make one contract for all its oil, where it claims that there is only one company which can supply the total amount required; that separate contracts could be made for the separate stations in the same manner as with the Mutual Gas Light Company; that the complainant abandoned in 1905 a contract more advantageous than the one subsequently entered into; and by the proper use of modern machinery complainant would not be restricted to homogeneous oils; that the prices paid by complainant are excessive and above the rates paid by other companies.

Coke and Other Residuals.—The residuals from the manufacture of gas are handled by middlemen with poor results to the company. That the yield of salable coke is insufficient, that the coke sales of the company are stated by the Master to have averaged $4.71
567 per short ton (2,000 pounds) to the "inside" company handling the coke, while but $2.35, or one-half is realized by the gas company. Although the stock of the company which handles the coke is owned by the Consolidated Gas Company, the returns to the gas company amount to but four cents per 1,000 cubic feet of gas sold. That the other residuals are not handled to the best advantage. Coal tar is handled by an outside corporation on still better terms to itself. When the market price of tar products is 7 cents per gallon, the gas company's share by contract is a trifle over 2 cents.

Ammonia liquor is treated on somewhat similar lines; the complainant receiving for its share about one-half the market price. That the other residuals are not handled to the best advantage, and that all the residuals which the present state of the art returns, are not made use of.

Candle Power.—That the average candle power maintained was unnecessarily in excess of the legal requirements.

Real Estate.—That the complainant holds, claims a return and pays taxes on considerable real estate in excess of the amount actually or necessarily in use in its business.

That by all of the above the cost of gas to the complainant is increased; that by proper management the cost to complainant could be reduced and such wasteful methods should not be permitted to increase the cost as against the consumer.

Fifty-fifth Exception. For that the said Master, on pages 129, 130 and 131 of his Report, finds that an examination of the figures as to the cost of gas by other companies does not sustain the contention that the complainant's operating cost is excessive; whereas, he should have found that such figures show that the cost to the com-
568 plainant is excessive, and that the complainant finds it cheaper to buy gas than to manufacture it; and buys a considerable portion of its output from other companies; that its plants are not as advantageously arranged or equipped to produce gas as such other companies; and that it is not justified in charging the consumer with such excess cost.

Rate of Return.

Fifty-sixth Exception. For that the said Master on page 141 of his report has found that the rate of 80 cents per thousand cubic feet of gas sold by complainant would give a return of 2.8 per cent. on its assets and 3.6 per cent. on its assets exclusive of franchise and good will, neither of which constituted a fair and reasonable return on the value of the property and on pages 141 and 151 complainant's amendment XIII. that such a fair and reasonable rate is not less than 6 per cent.

Whereas he should have found that the rates of 2.8 per cent. and 3.6 per cent. return were fair and reasonable; that the records show that both the public and the complainant are content with similar investments bringing no greater return; that complainant is not entitled to a 6 per cent. return.

Fifty-seventh Exception. For that the Master has found that the 80c. rate does not allow the complainant a reasonable return upon the fair value of the property actually and necessarily used in the business of making and distributing gas.

Whereas he should have found that with net earnings of $6,807,-455.15 based on a cost of 52.50c. (see Forty-fourth Exception) after deducting 20c. per thousand on 13,283,000,000 feet of sales or $2,656,600 would leave a balance of $4,150,855.15 which would provide a return of 4.97 per cent. on a valuation of $83,357,000 and a return of 6.55% on a valuation of $63,357,000 and a still higher return on a valuation based on a fair present valuation of
569 the property; that none of such rates are unfair or unreasonable.

Pressure.

Fifty-eighth Exception. For that the said Master has found on page 142 that modern appliances such "as Welshbach burners, gas logs and gas ranges require a much higher pressure for service to consumers than was the case some years ago;" and has also found, page 143 and 151-152 complainant's amendment, that the method suggested for overcoming at moderate cost the deficiency of com-

plainant's mains is subject to "some doubt suggested by the evidence as to the feasibility of the system" and "it appeared that the cost of the new construction necessary to carry out the plan as described would be in the neighborhood of $4,000,000 for main and valve construction alone, in addition to which would be required pumping stations and apparatus, the annual charges and operating expenses in connection with which Mr. Addicks testified would amount to several cents per thousand feet of gas sold, and which would involve a corresponding increase in operating cost or proper selling price of such gas" and on page 144 has found

"Under the distributing system as now existing and in operation, it is not possible to fulfil the statutory requirements as to pressure. It would, however, apparently be possible to remedy this condition, at least to some degree, by dividing the city into different districts according to the varying levels and by regulating the pressure in each by district governors. The efficiency and safety of such governors is not free from doubt and the evidence affords no sufficient basis for an estimate of the cost of their installation or the expense of making the necessary changes in the system of mains."

Whereas he should have found that the distribution system as now existing is inadequate for the output of complainant; that by
570 a proper increase of capacity in such system gas could be furnished at pressures within the limits of the statute; that the Welsbach burner gave as high an efficiency at 1½ pressure as at any other within reasonable bounds, and that heating appliances, requiring large volumes of gas, did not require higher pressure, but more adequate piping as demanded in complainant's house piping rules and regulations; also that such cost for new construction was grossly exaggerated, being based on a rate for piping four times greater than the cost of complainant's mains laid under asphalt, according to complainant's highest "or not for taxation purposes" estimate. Also that it appears both from the testimony and exhibits that such governors have been in use throughout the stations of the complainant day and night, and when piping is adequate, with perfect success.

Fifty-ninth Exception. For that the said Master has refused to find as requested by the State, on page 168, XII., and by the City, on page 189, seventh, that a reduction in price of gas leads to a proportionate increase in the per capita consumption in The City of New York of 46.46 cents for each 1 cent of reduction, and that on such basis the estimated sales of complainant in 1907 would be 15,300,000,000 cubic feet.

Whereas, he should have so found, and further found, that such an increase should be considered in determining the net earnings from the reduced rate, and not by the method followed on page 140 of deducting 20 cents per thousand on the output for the year 1905, on the basis of the old rate.

Sixtieth Exception. For that the Master has allowed on page 148, Complainant's Amendment VII., and on page 114

"that the propriety of an allowance sufficient to bring the amount expended for current repairs and renewals for any one year

571 up to the average covering a period of years, is fully established by the evidence."

Whereas, he should have found that such addition should not have been allowed without allowing the average of other items entering into the cost, concerning which, for years other than 1905, defendants were denied access to the books of complainant; and further that the repairs for past years are no criterion for the present, owing to the improvements in the manufacture of gas during the past thirty years.

Sixty-first Exception. For that the said Master has allowed Complainant's Amendment II., page 147, whereas he should not have so found; but should have found that the capital required for coal gas at Astoria as shown by the exhibits, would have made it inadvisable to construct such works unless far better results could have been reasonably anticipated.

Sixty-second Exception. For that the said Master has allowed Complainant's Amendment IV., page 147, whereas he should not have allowed the same; but have found that such figure omits several important items, the most important being surplus fund of $1,328,000, and therefore is not the net earnings from gas as stated.

Sixty-third Exception. For that the said Master on pages 147 and 148 has allowed the Complainant's Amendment VI., whereas he should not have allowed same; but have found that such amendment ignores the progress made in the last thirty years in the manufacture of gas.

Sixty-fourth Exception. For that the said Master has allowed, on pages 147, 148, Complainant's Amendment VIII., with regard to items not included in the 65.84 cents found on page 126.

Whereas, he should not have allowed the same, but should have found that the figure 65.84 cents, including, as it does, an
572 unexpended amount of $1,328,000, as a surplus earnings, more than covers all assumed and problematic expenses injected into the business of gas manufacture and distribution, and not warranted by Complainant's past practice, nor by any correct method of bookkeeping.

Sixty-fifth Exception. For that the Master on page 149 has allowed Complainant's Amendment IX., that "oil is cheaper in Chicago than New York, and that,"

Whereas, he should have found that complainants have raised the price of oil in New York by a specification in regard to its quality and therefore there is no basis of comparison with New York, nor is the kind or degree of oil specified.

Sixty-sixth Exception. For that the Master on page 156 has overruled State's Amendment Twelfth, whereas he should have allowed the same.

Sixty-seventh Exception. For that the said Master on page 156, has overruled State's Amendment Fourteenth, whereas the same should have been allowed.

Sixty-eighth Exception. For that the said Master on page 159 has overruled State's Amendment Twenty-fifth, whereas the same should have been allowed.

Sixty-ninth Exception. For that the said Master has refused to find State's amendment I, page 160, whereas the same should have been allowed.

Seventieth Exception. For that the said Master has disallowed State's amendment II., pages 161-2, whereas the same should have been allowed.

Seventy-first Exception. For that the said Master has disallowed State's amendment III., page 163, whereas the same should have been allowed.

573 *Seventy-second Exception.* For that the said Master has disallowed State's amendment IV., page 163, whereas the same should have been allowed.

Seventy-third Exception. For that the said Master has disallowed part of State's amendment VI., pages 164, 165, whereas the same should have been allowed.

Seventy-fourth Exception. For that the said Master has disallowed State's amendment IX., page 166, whereas the same should have been allowed.

Seventy-fifth Exception. For that the said Master on page 169, has disallowed State's Fifth Special Finding, whereas the same should have been allowed.

Seventy-sixth Exception. For that the said Master on pages 169-170 has disallowed State's Special Finding Sixth, whereas the same should have been allowed.

Seventy-seventh Exception. For that the Master on page 172 has disallowed part of State's Special Finding Twelfth, whereas the same should have been allowed.

Seventy-eighth Exception. For that the said Master on page 173 has disallowed part of State's Special Finding Thirteenth, whereas the same should have been allowed.

Seventy-ninth Exception. For that the said Master on page 174, has disallowed part of State's Special Finding Fourteenth, whereas the same should have been allowed.

Eightieth Exception. For that the said Master has on page 181 disallowed part of State's Special Finding Thirty-third, whereas the same should have been allowed.

Eighty-first Exception. For that the Master on page 182, has disallowed State's Special Finding Thirty-fourth, whereas the same should have been allowed.

574 *Eighty-second Exception.* For that the said Master on page 182 has disallowed State's Special Finding Thirty-fifth, whereas he should have so found.

Eighty-third Exception. For that the said Master on page 183, has disallowed State's Special Finding Thirty-sixth, whereas the same should have been allowed.

Eighty-fifth Exception. For that the said Master on page 183 has disallowed State's Special Finding Thirty-seventh, whereas the same should have been allowed.

Eighty-sixth Exception. For that the Master has disallowed City's amendment Fifth, page 189, whereas the same should have been allowed.

Eighty-seventh Exception. For that the said Master on page 190 has disallowed part of City's amendment Eighth and has found, page 191:

"It is clear that by the proper diligence defendants could have secured inspection of the plants at a much earlier date than it was in fact begun, and this fact was repeatedly brought to the attention of counsel during the progress of the hearings."

Whereas he should have found, as requested, and that the defendants made every effort to have the Master pass on their application made at the first session, but failing to do so, finally sought relief by applying to the Courts.

Eighty-eighth Exception. For that the said Master at page 191-192 has disallowed City's amendment Eleventh, whereas the same should have been allowed.

575 The defendant, The City of New York, adopts such of the exceptions filed by the other defendants as have not been specifically covered herein.

Respectfully submitted,

FRANCIS K. PENDLETON,
Corporation Counsel, Solicitor for Defendant The City of New York, Hall of Records, Manhattan, N. Y. City.

WILLIAM P. BURR,
Of Counsel.

Endorsed: Circuit Court of the United States, Southern District of New York. The Consolidated Gas Company of New York, Complainant, against Julius M. Mayer as Attorney General of the State of New York, The City of New York *et al.*, Defendants. Exception to Master's Report Taken by Defendant The City of New York. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. Filed Aug. 7th, 1907, "*nunc pro tunc*" July 24th, 1907. U. S. Circuit Court, Southern District of N. Y. Filed Aug. 7, 1907, John A. Shields, Clerk.

576 Circuit Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

Notice of Final Hearing.

Take notice that this cause and the issues therein will be brought on for final hearing at a Stated Term of the Circuit Court of the

United States for the Southern District of New York, to be held at its Court Rooms in the General Post Office Building, in the Borough of Manhattan, City of New York, on Monday, the 21st day of October, 1907, at the opening of the Court on that day or as soon thereafter as counsel can be heard, and that at the same place and time we shall move the said Court for an order, overruling the exceptions to and confirming the Master's Report herein, and shall also move on the pleadings herein, the order appointing the Special Master, the testimony, exhibits and the said Master's Report and all the proceedings herein, for a Final Decree, in accordance with the prayer of the Bill of Complaint herein and for such other and further or different relief as to the Court may seem meet and the nature of this case may require.

New York, August 15, 1907.

Yours, &c., SHEARMAN & STERLING,
Solicitors for Complainant,
44 Wall Street, New York City.

577 To William S. Jackson, Esq., as Att'y Gen'l of the State of New York and as solicitor for the defendants, Frederic E. Gunnison, John C. Davies, and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity;
Francis K. Pendleton, Esq., corporation counsel, solicitor for defendant, The City of New York.
Robert C. Taylor, Esq., solicitor for defendant William Travers Jerome, as district attorney.

Endorsed: Cir. Ct. of the U. S., So. Dist. of N. Y. Consolidated Gas Company of New York, against William S. Jackson, as Att'y Gen'l *et al.*, Notice of Hearing. Shearman & Sterling, Solicitirs for Complainant, 44 Wall Street, N. Y., Service of the within notice is hereby admitted this 15th day of August, 1907, Wm. S. Jackson, Att'y Gen'l of the State of New York and Solicitor for Comm. of Gas & Electricity. Robert C. Taylor, Solicitor for William Travers Jerome as Dist. Atty. A copy of the within paper has been this day received at the office of the Corporation Counsel, Aug. 15, 1907, Francis K. Pendleton, Corporation Counsel. U. S. Circuit Court, Southern District of N. Y., Filed Aug. 15, 1907, John A. Shields, Clerk.

578 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Post Office Building in said District, on the 2nd day of October, 1907.

Present: Hon. E. Henry Lacombe, Circuit Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

On reading and filing the affidavit of Henry H. Whitman, sworn to the 2nd day of October, 1907, and on the annexed consent of the solicitors for all parties, it is

Ordered: That William R. Willcox, Chairman, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission for the First District, be and hereby are substituted parties defendants herein in place of the defendants, Frederic E. Gunnison, John C. Davies and Lucian
579 L. Shedden, constituting the New York State Commission of Gas and Electricity, and that this suit be continued against them as parties defendants herein, without prejudice to the proceedings already had herein, the answer of said last named defendants heretofore filed herein to stand as the answer of said William R. Willcox, Chairman, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission for the First District; and it is further

Ordered: That the exceptions heretofore filed to the Special Master's report on behalf of the said defendants, Gunnison and others, stand as the exceptions of said substituted defendants.

E. H. LACOMBE,
U. S. Circuit Judge.

We hereby consent to the entry of the foregoing order.
Dated, New York, October 1, 1907.

SHEARMAN & STERLING,
Solicitors for Complainant.
W. S. JACKSON,
Attorney-General.
ROB'T C. TAYLOR,
Solicitor for William Travers Jerome, as District Attorney.
580 FRANCIS K. PENDLETON,
Solicitor for the City of New York.
ABEL E. BLACKMAR,
Solicitor for the Public Service Commission.

581 Circuit Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC C. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Henry H. Whitman, being first duly sworn, says:—
I am Assistant Counsel to the Public Service Commission for the First District.
William R. Willcox, Chairman, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis constitute the Public Service Commission for the First District, under Chapter 429 of the Laws of 1907, to which reference is hereby made, and whereby the above named Commission of Gas and Electricity was abolished.

HY. H. WHITMAN.

Sworn to before me this 2nd day of October, 1907.

[SEAL.] LE ROY T. HARKNESS,
Notary Public, Kings Co.

Cert. Filed in N. Y. Co.

Endorsed: U. S. Circuit Court, Southern District of New York, Complainant, against William S. Jackson, as Attorney General, etc. and others, Defendants. Order of substitution. U. S. Circuit Court Southern District of N. Y., Filed Oct. 2, 1907, John A. Shields, Clerk.

582 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General, etc.; WILLIAM R. WILLCOX ET AL., Constituting the Public Service Commission of the First District, Impleaded.

Please take notice that on the record herein and the annexed affidavit of Edward B. Whitney, the undersigned will move this court at a Stated Term thereof to be held at the Federal Building in the County of New York, on November 1, 1907, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for leave to file the annexed supplemental exceptions to the report of the Special Master herein, without prejudice to the proceedings

already had, and for such other or further relief in the premises as may be equitable.

Dated New York, October 28, 1907.

ABEL E. BLACKMAR,
Solicitor for the Defendants William R. Willcox et al., Constituting the Public Service Commission for the First District.

To Messrs. Shearman & Sterling, solicitors for complainant;
Hon. William S. Jackson, Attorney General;
Hon. Francis K. Pendleton, solicitor for defendant City of New York;
Robert C. Taylor, Esq., solicitor for William Travers Jerome, as District Attorney, etc.

583 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General, etc.; WILLIAM R. WILLCOX ET AL., Constituting the Public Service Commission of the First District, Impleaded.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Edward B. Whitney being duly sworn says I am the special assistant, for the purposes of the defense to this suit, of Abel E. Blackmar, Esq., the counsel to the Public Service Commission of the First District under the New York Statute, Chapter 429 of the Laws of 1907. Although said commission became the successors to the original defendants Frederick E. Gunnison *et al.*, constituting the New York State Commission of Gas and Electricity, upon the abolition of the latter commission by said statute on July 1, 1907, no application was made by any of the other parties to this suit to bring the members of the new commission in as parties, until by consent they were joined as parties defendant by order entered Oc-
584 tober 2, 1907. Exceptions were filed herein by the solicitor for said former commission on or about July 23, some three weeks after it went out of existence, and the order bringing in members of the present commission as parties permitted them to join in the exceptions so taken. Owing to the great volume and complexity of the record herein, it was necessary for me to spend a large amount of time and work upon the other portions thereof before I could intelligently deal with said exceptions, and I understood that they covered all of the questions in the case; nor was I able to give them careful examination until within two days past, having but within a few days been able to take up for careful consideration the questions which as I understand the practice are properly subject *of* exception, namely, whether the various statements of fact in the Master's report are sustained by the evidence in the case.

On examining the exceptions aforesaid I find that they fail specifically to refer to the complainant's claim of franchise derived from the Anthracite Gas Lighting and Heating Company, and that also by some inadvertence the franchise of the Municipal Gas Light Company is referred to in the "Thirty-fourth" exception in lieu of that of the Harlem Gas Light Company, whereas the franchise of the Harlem Gas Light Company is referred to in the "Thirty-sixth" exception in lieu of that of the Municipal Gas Light Company,
585 and the date of expiration of said last named franchise (if valid) is given as February 1, 1907, instead of March 22, 1907, and that they also fail to set up the invalidity of the alleged franchise of the Municipal Gas Light Company and of the alleged franchise claimed by the Knickerbocker Gas Light Company from said Anthracite Company. These objections to the Master's report are included in the exceptions filed on behalf of the City of New York. The exceptions filed on behalf of said former commission also failed to cover the objection to the inclusion of the capital of the National Coal & Coke Company, which is also covered by the exceptions filed on behalf of the City of New York. I find also that a large number of exceptions have been filed to matter merely evidentiary and therefore not subject to exception as I understand the procedure; and among these I find that exception has been taken to the findings of the Master that certain disbursements made or claimed to have been made by the complainant during the year 1905, or pertaining to its business for the year 1905, were properly chargeable to operating expenses or to the cost of making and distributing gas during that year. Among the items so objected to, the item of $406,909.23 is not included in the exceptions filed on behalf of said former commission, in which the present commission is per-
586 mitted to join, although it is included in the exceptions filed on behalf of the city. In order to avoid any claim of waiver or concession by reason of this omission, and for greater caution, we desire to be permitted to add an exception covering this specific item.

EDWARD B. WHITNEY.

Sworn to before me this 28th day of October, 1907.

[N. S.] S. M. HAYES,
Notary Public, #201, *New York County*.

587 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM M. CARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the First District, and THE CITY OF NEW YORK, Defendants.

Supplemental Exceptions to Master's Report.

The defendants William R. Willcox, William M. Carroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the First District, respectfully except to the following rulings of the Master in his report in the above entitled suit:

A. That the franchises of the New York Gas Light Company and the Manhattan Gas Light Company were still in existence on May 1, 1906.

B. That the franchise of the Metropolitan Gas Light Company was still in existence on May 1, 1906.

C. That the franchise of the Harlem Gas Light Company was still in existence on May 1, 1906.

588 D. That the alleged franchise of the Municipal Gas Light Company was valid.

E. That the alleged franchise derived from chapter 944 of the Laws of 1871 became the property of or available to the Knickerbocker Gas Light Company.

F. That the alleged franchise of the Anthracite Gas Lighting and Heating Company was valid.

G. That the Knickerbocker Gas Light Company succeeded to the rights of said last named company under said last named franchise.

H. That the complainant's shares of stock in the National Coal and Coke Company are a part of the property employed in the supply of gas.

I. That the item of $406,909.23 included in complainant's Exhibit 94, in item 66, is properly to be taken into consideration in estimating the probable operating expenses of the complainant after May 1, 1906; whereas it should be diminished to an amount representing the tax upon complainant's tangible property situated in, upon, under or above the streets, highways, public places and public waters in connection with its special franchise, or upon said tangible property *plus* any further value of its special franchise after the reduction of its charge for gas to eighty cents per thousand cubic feet.

ABEL E. BLACKMAR,
Solicitor for Exceptants.

589 Endorsed: United States Circuit Court, Southern District of New York. Consolidated Gas Company of New York, Complainant, against William S. Jackson, as Attorney General, etc., *et al.*, Defendants. Notice of Motion, Affidavit and Supplemental Exceptions. Abel E. Blackmar, Solicitor for the defendants, William R. Willcox, *et al.*, constituting the Public Service Commission for the First District. Service of a copy of the within notice of motion, affidavit and supplemental exceptions admitted this 28th day of October, 1907. Shearman & Sterling, Solicitors for Complainant; William S. Jackson, Attorney General; F. K. Pendleton, Solicitor for defendant City of New York; Robert C. Taylor, District Attorney, etc., U. S. Circuit Court, Southern District of N. Y., Filed Nov. 2, 1907, John A. Shields, Clerk.

590 *Order Substituting Defendants.*

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building in said District, on the 2nd day of October, 1907.

Present: Hon. E. Henry Lacombe, Circuit Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; FREDERIC E. GUNNISON, JOHN C. DAVIES, and LUCIAN L. SHEDDEN, Constituting the New York State Commission of Gas and Electricity, and THE CITY OF NEW YORK, Defendants.

591 On reading and filing the affidavit of Henry H. Whitman, sworn to the 2nd day of October, 1907, and on the annexed consent of the solicitors for all parties, it is

Ordered, that William R. Willcox, Chairman, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the First District, be and hereby are substituted parties defendants herein in place of the defendants, Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and that this suit be continued against them as parties defendants herein, without prejudice to the proceedings already had herein, the answer of said last named defendants heretofore filed herein to stand as the answer of said William R. Willcox, Chairman, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission for the First District; and it is further

Ordered, that the exceptions heretofore filed to the Special Master's Report on behalf of said defendants, Gunnison and others, stand as the exceptions of said substituted defendants.

E. H. LACOMBE,
J. S. Circuit Judge.

592 We hereby consent to the entry of the foregoing order. Dated, New York, October 1, 1907.

SHEARMAN & STERLING,
Solicitors for Complainant.
W. S. JACKSON,
Attorney General.
ROBERT C. TAYLOR,
Solicitor for William Travers Jerome, as District Attorney.
FRANCIS K. PENDLETON,
Solicitor for the City of New York.
ABEL E. BLACKMAR,
Solicitor for the Public Service Commission.

(Endorsed:) U. S. Circuit Court, Southern District of New York. Consolidated Gas Company of New York, Complainant, against William S. Jackson, as Attorney General, etc., and others, Defendants. Order of Substitution. U. S. Circuit Court, Southern District N. Y. Filed Oct. 2, 1907. John A. Shields, Clerk.

593 *Order Granting Leave to File Supplemental Exceptions.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the City of New York this 1st day of November, 1907.

Present: Hon. Henry Galbraith Ward, Circuit Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General, etc.; WILLIAM R. WILLCOX ET AL., Constituting the Public Service Commission of the First District, Impleaded.

The motion of defendants William R. Willcox and others constituting the Public Service Commission of the First District, for leave to file supplementary exceptions coming on to be heard, and no opposition being made thereto, it is hereby

594 Ordered that said defendants have leave to file the supplemental exceptions, a copy whereof is annexed to the notice of said motion, without prejudice to the proceedings already had.

H. G. WARD, *W. S. C. J.*

(Endorsed:) United States Circuit Court Southern District of New York Consolidated Gas Company of New York, Complainant, against William S. Jackson as Attorney General etc., William R. Willcox *et al.*, constituting the Public Service Commission of the First District, impleaded. Order. Abel E. Blackmar, Solicitor for Public Service Commission for the First District. U. S. Circuit Court, Southern District N. Y. Filed Nov. 2, 1907. John A. Shields, Clerk.

595 *Supplemental Exceptions to Master's Report.*

United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney-General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM M. CARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the First District, and THE CITY OF NEW YORK, Defendants.

The defendants, William R. Willcox, William M. Carroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the First District, respectfully except to the following rulings of the Master in his report in the above entitled suit:

596 A. That the franchise of the New York Gas Light Company and the Manhattan Gas Light Company were still in existence on May 1, 1906.

B. That the franchise of the Metropolitan Gas Light Company was still in existence on May 1, 1906.

C. That the franchise of the Harlem Gas Light Company was still in existence on May 1, 1906.

D. That the alleged franchise of the Municipal Gas Light Company was valid.

E. That the alleged franchise derived from chapter 944 of the Laws of 1871 became the property of or available to the Knickerbocker Gas Light Company.

F. That the alleged franchise of the Anthracite Gas Lighting and Heating Company was valid.

G. That the Knickerbocker Gas Light Company succeeded to the rights of said last named company under said last named franchise.

H. That the complainant's shares of stock in the National Coal and Coke Company are a part of the property employed in the supply of gas.

I. That the item of $406,909.23 included in complainant's Exhibit 94, in item 66, is properly to be taken into consideration in estimating the probable operating expenses of the complainant after May 1, 1906; whereas it should be diminished to an amount representing the tax upon complainant's tangible property sit-

597 uated in, upon, under or above the streets, highways, public places and public waters in connection with its special franchise, or upon said tangible property *plus* any further value of its special franchise after the reduction of its charge for gas to eighty cents per thousand cubic feet.

ABEL E. BLACKMAR,
Solicitor for Said Exceptants.

(Endorsed:) United States Circuit Court, Southern District of New York. Consolidated Gas Company of New York, Complainant, against William S. Jackson, As Attorney General, etc., *et al.*, Defendants. Supplemental Exceptions. Abel E. Blackmar, Solicitor for said exceptants. U. S. Circuit Court, Southern District N. Y. Filed Nov. 2, 1907. John A. Shields, Clerk.

598 At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the City of New York this 1st day of November, 1907.

Present: Hon. Henry Galbraith Ward, Circuit Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General, etc.; WILLIAM R. WILLCOX ET AL., Constituting the Public Service Commission of the First District, Impleaded.

The motion of defendants William R. Willcox and others constituting the Public Service Commission of the First District, for leave to file supplementary exceptions, coming on to be heard, and no opposition being made thereto, it is hereby

Ordered that said defendants have leave to file the supplemental exceptions, a copy whereof is annexed to the notice of said motion, without prejudice to the proceedings already had.

H. G. WARD,
U. S. C. J.

Endorsed: United States Circuit Court Southern District of New York. Consolidated Gas Company of New York, Complainant, against William S. Jackson, as Attorney General etc., William R. Wilcox *et al.*, constituting the Public Service Commission of the First District, impleaded. Order. Abel E. Blackmar, Solicitor for Public Service Commission for the First District. U. S. Circuit Court Southern District of New York. Filed Nov. 2 1907. John A. Shields, Clerk.

599 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Monday, the fourth day of November, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Charles M. Hough, Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK
vs.
JULIUS M. MAYER, as Attorney General of the State of New York, and Others.

The Exceptions to the Master's Report in the above entitled cause coming on for hearing, Alton B. Parker, Esq., is heard on behalf of

the defendant City of New York, William A. De Ford, Esq., is heard on behalf of the defendant State of New York, Charles F. Mathewson, John A. Garver and James M. Beck are heard for the Complainant. Edward B. Whitney, Esq., is heard in reply on behalf of the Public Service Commission, David B. Hill, Esq., is also heard in reply on behalf of the State of New York.

The Court takes the cause under advisement.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

600 (Reg. 62, Fol. 248.)

Circuit Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY
against
CITY OF NEW YORK ET AL.

Bill in equity alleging the unconstitutionality of certain Statutes of the State of New York, and of a certain order passed by "The Commission of Gas and Electricity" for the said State, pursuant to statutory authority.

Charles F. Mathewson, John A. Garver and James M. Beck, for complainant;

Francis K. Pendleton, Corporation Counsel; and Alton B. Parker, William P. Burr and William J. Clarke, for The City of New York;

Alfred R. Page, William A. Deford and David B. Hill, for Hon. Wm. S. Jackson, Attorney General;

Abel E. Blackmar and Edward B. Whitney, for the Public Service Commission.

HOUGH, *D. J.:*

(*History of the Litigation.*)

By cap. 736 of 1905 (N. Y. Sessions Laws), all corporations or persons engaged in the business of furnishing or selling illu-
601 minating gas in The City of New York were forbidden to charge said City a higher price therefor than 75 cents per thousand cubic feet. The same act required that all gas so sold should have a specified illuminating power, and also that the pressure of such gas in any service main in the City and at all distances from the place of manufacture in said City, should not be less than one inch nor more than two and a half inches. It was further provided that any person or corporation violating any provision "of this act shall forfeit the sum of $1,000 for each offence."

Cap. 737 of 1905 created "The Commission of Gas and Electricity," and among other powers gave the Commission that of entertaining written complaints signed by more than a hundred customers of any gas company, or by the chief executive officers or

officers of a City or other municipal organization; to examine by public hearing into the propriety of the price charged by said company for its product, and after such hearing to fix "the maximum price of gas * * * which shall be charged by such corporation in such municipality." The Commission had also authority granted to it, to fix the standard of illuminating power of gas manufactured and sold in any municipality; as also the standard of pressure thereof; provided such standard of illumination should not be less than that prescribed by law, and that the establishment of a standard of pressure should only be made where it was not otherwise legally prescribed.

In pursuance of these powers the Commission on February 23, 1906, made an order specifically affecting this complainant, and requiring that on and after May 1, 1906, the maximum price for gas furnished within the Borough of Manhattan in this City be fixed at 80 cents per thousand, and also requiring this complainant to furnish gas with an illuminating power of not less than that prescribed by the first statute referred to, and likewise requiring it to maintain the pressure provided for by said statute.

602 On April 3, 1906, the Legislature enacted chapter 125 of the Laws of that year, which fixed the price of gas for all persons or corporations manufacturing, furnishing or selling the same in the Borough of Manhattan at 80 cents per thousand, and also made applicable to gas furnished by any person or corporation in said Borough to private consumers, the same regulation as to illuminating power and pressure which in the previous year had been applied to gas consumed by the municipality. This act also declares that the violation of any provision thereof shall occasion the forfeiture of "the sum of $1,000 for each offense to the People of the State."

On the same day that the Gas Commission's order became operative, *i. e.*, May 1, 1906, this action was begun by the company especially affected, which is also the principal gas manufacturing and supplying company, doing business in the Borough of Manhattan.

The parties defendant to this proceeding are the Attorney-General of the State and the District Attorney of New York County, they being the officers upon whom is imposed the duty by section 1962 of the New York Code of Civil Procedure to institute suits for the recovery of the penalties prescribed by the statutes referred to; The City of New York, and the several members of the Commission, the constitutionality of whose order is attacked by the bill, were the remaining original defendants.

During the pendency of the suit the Commission of Gas and Electricity has been abolished, and all its powers and duties transferred to a new board known as the "Public Service Commission," which last is specifically charged by recent legislation with the enforcement of orders made by the old Commission, and therefore with the enforcement of the order complained of. The Public Service Commission has appeared in this action in the place and stead of the defunct Gas Commission.

603 An injunction *pendente lite* issued herein restraining the enforcement of the said statutes and order (146 R., 150),

and as of July 5, 1906, and order of reference was made to Arthur H. Masten, Esq., as Special Master, "to take all the testimony herein, make all needed computations, and fully find the facts." For nearly a year the cause proceeded before the Master, who on June 24, 1907, filed his report; and the cause is now before the Court on final hearing under complainant's motion that an order be now made "overruling the exceptions to and confirming the Master's report herein;" and complainants also move for a "final decree in accordance with the prayer of the bill."

(*The Issues in the Case.*)

The complainants seek to enjoin the Attorney-General and District Attorney from prosecuting under the penalty clauses in the statutes above referred to; to enjoin The City of New York from insisting upon the 75 cent rate given it by the Act of 1905; to enjoin the Public Service Commission from enforcing said order of the Gas Commission, and to attain these objects because,

1st. The 80-cent gas rate is substantially confiscatory;

2d. The two statutes taken together are unconstitutionally discriminatory;

3d. The penalty clauses in both statutes are so oppressive as to be unconstitutional;

4th. The provisos regulating pressure in the mains are (under commercially possible conditions) impossible of fulfillment, and therefore illegal; and

5th. The legislative power was by the statute creating the Gas Commission improperly and unlawfully delegated to that body.

(*The first question of fact tried before the Master.*)

The report states this inquiry as to "ascertain the value of the assets employed in the production and distribution of the gas
604 sold by complainant." This is obviously an inquiry preliminary and vital to ascertaining whether the 80-cent rate for the sale of gas yields any return at all. The report states that such assets consist of:

Tangible Assets.

Real estate	$13,461,000 00
Plant	15,500,000 00
Mains	12,636,000 00
Services	1,994,000 00
Meters and miscellaneous	4,100,000 00
Working capital	3,616,000 00
Coal & Coke Company	50,000 00
Astoria establishment, representing capital invested in production of gas secured from other companies	12,000,000 00
	$63,357,000 00

Intangible Assets.

Franchises and good will	20,000,000 00
Total assets	$83,357,000 00

The disputed questions involved in this finding (so far as tangible property is concerned), are three:

First. Whether the values ascribed to the several enumerated items of property are based upon competent and persuasive evidence.

Second. Whether the method of valuation pursued by the Master is in accordance with law, and

Third. Whether (assuming said items of property to be possessed and enjoyed by complainant), they are "employed (within the legal signification of that word) in the production and distribution of gas.

605 From an examination of the expert testimony submitted, and giving due weight to the careful and able report of the Master, it is clear that the first query must be answered affirmatively, and it be found that complainant was when this action began in the possession and enjoyment of property of the kind and value above set forth.

The question first stated, and just answered, is wholly one of fact; but the second and third are largely, if not entirely, questions of law.

(*Method of Valuation.*)

As to the realty, the values assigned are those of the time of inquiry; not cost when the land was acquired for the purposes of manufacture, and not the cost to the complainant of so much as it acquired when organized in 1884, as a consolidation of several other gas manufacturing corporations.

It is objected that such method of appraisement seeks to confer upon complainant the legal right of earning a fair return upon land values which represent no original investment by it; does not indicate land especially appropriate for the manufacture of gas; and increase apparent assets without increasing earning power.

Analogous questions arise as to plant, mains, services and meters; the reported values whereof are the reproductive cost less depreciation, and not original cost to the complainant or its predecessors.

It appears by undisputed evidence that some of these last items of property cost more than new articles of the same kind would have cost at the time of inquiry; that some are of designs not now favored by the scientific and manufacturing world, so that no one now entering upon a similar business would consider it wise to erect such machines or obtain such apparatus. In every instance, how-

606 ever, the value assigned in the report is what it would cost presently to reproduce each item of property, in its present condition, and capable of giving service neither better nor worse than it now does.

As to all of the items enumerated, therefore—from real estate to meters inclusive—the complainant demands a fair return upon the reproductive value thereof, which is the same thing as the present value properly considered.

To vary the statement, complainant's arrangements for manufacturing and distributing gas are reported to be worth the amounts above tabulated if disposed of (in commercial parlance) "as they are."

Upon authority, I consider this method of valuation correct. What the Court should ascertain is the "fair value of the property being used" (*Smyth vs. Ames*, 169 U. S., at 546); the "present" as compared with "original" cost (*ibid.*, p. 547); and what complainant "employs for the public convenience" (*ibid.*, p. 547); and it is also the "value of the property *at the time* it is being used" (*San Diego Land Co. vs. National City*, 174 U. S., at 757. And see also *Stanislaus Co. vs. San Joaquin Co.*, U. S., 201).

It is impossible to observe this continued use of the present tense in these decisions of the highest Court without feeling that the actual or reproductive value at the time of inquiry is the first and most important figure to be ascertained; and these views are amplified by *San Diego Land Co. vs. Jasper* (110 Fed. Rep., at 714), and *Cotting vs. Kansas City Stock Yards* (82 Fed. Rep., at 854), where the subject is more fully discussed.

Upon reason, it seems clear that in solving this equation the plus and minus quantities should be equally considered, and appreciation and depreciation treated alike. Nor can I conceive of a case
607 to which this procedure is more appropriate than the one at bar. The complainant by itself and some of its constituent companies has been continuously engaged in the gas business since 1823. A part of the land in question has been employed in that business for more than two generations, during which time the value of land upon Manhattan Island has increased even more rapidly than its population. So likewise the construction expense not only of buildings, but of pipe systems under streets now consisting of continuous sheets of asphalt over granite, has enormously advanced.

The value of the investment of any manufacturer in plant, factory or goods, or all three, is what his possessions would sell for upon a fair transfer from a willing vendor to a willing buyer; and it can make no difference that such value is affected by the efforts of himself or others; by whim or fashion; or (what is really the same thing) by the advance of land values in the opinion of the buying public. It is equally immaterial that such value is affected by difficulties of reproduction. If it be true that a pipe line under the New York of 1907 is worth more than was a pipe line under the City of 1827, then the owner thereof owns that value; and that such advance arose wholly or partly from difficulties of duplication created by the City itself is a matter of no moment.

Indeed, the causes of either appreciation or depreciation are alike unimportant, if the fact of value be conceded or proved; but that ultimate inquiry is oftentimes so difficult that original cost and reasons for changes in value become legitimate subjects of investigation, as checks upon expert estimates or bookkeeping inaccurate and perhaps intentionally misleading (cf. *Ames vs. Union Pacific R. R.*, 64 Fed. Rep., at 178, 179).

If fifty years ago, by the payment of certain money, one acquired a factory and the land appurtenant thereto, and continues to-day his original business therein, his investment is the factory and the
608 land, not the money originally paid; and unless his business shows a return equivalent to what land and building, or land

alone, would give if devoted to other purposes (having due regard to cost of change), that man is engaged in a losing venture and is not receiving a fair return from his investment, *i. e.*, the land and building. The so-called "money value" of real or personal property is but a conveniently short method of expressing present potential usefulness, and "investment" becomes meaningless if construed to mean what the thing invested in cost generations ago. Property whether real or personal is only valuable when useful; its usefulness commonly depends on the business purposes to which it is or may be applied. Such business is a living thing, and may flourish or wither, appreciate or depreciate; but whatever happens, its present usefulness, expressed in financial terms, must be its value.

As applied to a private merchant or manufacturer the foregoing would seem elementary; but some difference is alleged to exist where the manufacturer transacts his business only by governmental license, whether called a franchise or by another name. Such license, however, cannot change an economic law, unless a different rule be prescribed by the terms of the license; which is sometimes done. No such unusual condition exists here; and in the absence thereof it is not to be inferred that any American government intended, when granting a franchise, not only to regulate the business transacted thereunder, and reasonably to limit the profits thereof, but to prevent the valuation of purely private property in the ordinary economic manner; and the property now under consideration is as much the private property of this complainant as are the belongings of any private citizen. Nor can it be inferred that such Government intended to deny the application of economic laws to valuation of increments earned or unearned, while insisting upon the usual results thereof in the case of equally unearned, and possibly unmerited, depreciation.

609 I think the method of valuation applied by the report to land, plant, mains, services and meters lawful. To "Working capital, Coke & Coal Co. and Astoria," the above considerations are not applicable, and these items will be treated separately.

(The Employment of Certain Items of Realty in the Manufacture and Distribution of Gas.)

It is not doubted that all the meters, services, mains and plant possessed and enjoyed by complainant, and of the value already considered, are employed in complainant's gas business.

I am not able to arrive at the same result in respect of all the real estate. Ownership is asserted in land on Manhattan Island worth upwards of $15,000,000; some of it so obviously held for purposes other than the manufacture or distribution of gas; that no serious endeavor has been made to include the same in the property upon which the gas business should yield to complainant a fair return. There remains, however, properties included in the report, fairly to be described as large tracts of land, the inclusion of which is justified upon the ground that complainant is entitled not only to a return upon that which it presently uses, but also upon something

more which it may require for similar use in the near future. How near that future may be is not shown, nor even intimated as to most of the disputed items, and it may fairly be said that in a suit such as this, proof of necessity near at hand should be required.

But there is one argument to me conclusive of the question raised by defendant's objections to the insertion in Capital account of the items termed in the report "Land leased, vacant and unimproved;" a phrase which includes most of the disputed items just referred to. Such argument rests upon a consideration of complainant's general business as explained by the testimony and briefs; of the necessities of its present situation; and of recent actual occurrences in respect of the Astoria plant (hereafter to be more fully
610 treated); which consideration convinces me that there is no intention on complainant's part to extend or enlarge its gas business on Manhattan Island in such manner as to require any substantial addition to the lands already actually applied to the necessities of that business. It is clear that for complainant to endeavor so to do would be unwise; it being apparent from any set of values propounded by any party hereto that a great, if not the greatest, obstacle to the cheaper yet profitable production of gas on Manhattan Island is the enormous value of the land already necessarily devoted to that purpose; and that any more island real estate will be so used the testimony does not compel me to believe. The folly, and therefore the improbability, of such a course is shown by one undisputed fact, viz., the present value of the real estate now confessedly devoted to gas making on Manhattan Island, is over $11,000,000 as found by the Master; yet at the present price of $1 a thousand the gross yearly income derived from the maximum production of everything on that $11,000,000 worth of land is less than $10,500,000. That the greatest product of which a plant is mechanically capable, is yearly worth less than the value of the land on which it stands, is a fact that speaks for itself, and needs no argument to prove that no man of business sense, will increase such a business misfortune.

Nor is it improper for the Court to take cognizance of contemporary local history, some details of which are in the evidence; and to recognize a determination on the part of the inhabitants of this island, to render difficult even the continuance, in so crowded a city, of a business which, in the language of one of complainant's witnesses, "renders us at best unpleasant neighbors."

For these reasons, I deem the plea advanced by complainant for the addition to its capital account of any Manhattan Island
611 land not now used for gas producing purposes legally invalid; and I exclude from the land valuation the present worth of leased, vacant and unimproved land, in the amount of $2,141,155. From the exclusion of these items, it necessarily follows that they should be regarded as no part of the complainant's Manhattan Island gas plant, and that therefore there must also be excluded from the legitimate expenses of the company the taxes upon these lands; and from its income, the rental derived from such as were leased at the time of inquiry. To this conclusion I am the

more willing to arrive, on observing that the only yearly revenue produced to the complainant by this $2,000,000 worth of New York real estate was about $37,000.

It has not been overlooked that many of the pieces of land just considered are adjacent to portions of the plants of the complainant; that as to some a definite purpose of utilization is testified to; but the fact remains that they have been held for very considerable periods and not used; that they ought not to be used for the economic reasons above given, and that the testimony regarding their probable use falls far short of establishing that necessity which can be the only excuse for the utilization of such an expensive luxury as Manhattan realty in the gas business of the complainant.

(*Lands Alleged Not to be Owned by Complainant.*)

Defendants also object to complainant treating as part of its invested capital, certain lands and land under water of which its ownership is denied. It appears that complainant, many years ago, acquired possession of these lands under deeds which in terms obliged it to reserve certain portions therefrom as public streets; or to vacate said portions for street purposes, whenever thereunto required by The City of New York. At the time of the conveyances much of the land in question appears to have been under water; most has long since been filled in; the streets have never been
612 opened, nor has any demand for such opening ever been made by the City; and most of the filled in property, affected by this objection, is not only in complainant's possession but is occupied by gas manufacturing establishments. It may be that complainant is liable to an action of ejectment; or that by process of condemnation, these pieces of property could be taken from it without compensation, upon the street opening being duly declared; but in my judgment it has given *prima facie* proof of title. If it were not occupying this debatable property, it would have been occupying either some of the lands already excluded as not employed in the gas business, or other lands of substantially equal value in the vicinity of its plants; for there is no contention that the land in question, however indifferent the title thereto, is not necessary for and actually used in complainant's business. The case is not different from what it would have been had defendants shown, not that the City threatened complainant's title or claimed that it had none, but that any third person had better title to the premises than the complainant, and might at any moment bring a successful action of ejectment therefor. It seems to me that in a proceeding of this kind such evidence would have been wholly immaterial.

But these considerations are not relevant to certain land under the East river in the neighborhood of Tompkins street. The title to that land under water may be as good or bad as that to the region intended, more than forty years ago, to be devoted to streets and not yet used for that purpose. But I cannot think that the land now in question, and under water, is employed in the complainant's gas business, in any proper sense. If it be assumed that the land is

owned in fee, it can be used for no other purpose than as a river bed, upon the surface of which water-borne freight approaches complainant's yards. The land under that river is of no more use to the complainant, because it is owned by it, than it would be
613 were it owned by the City or by the State of New York. It is the privilege of transportation over the river—which is open to all—that is valuable; and not the alleged ownership of the mud thereunder. I therefore exclude from the reported real estate valuation, the value of said land under water, viz.: (average valuation of complainant's witnesses) $160,000.

Subtracting these deductions, aggregating $2,301,155, from the reported value of the realty, viz., $13,461,000, I find the value of complainant's real estate actually used in the business under consideration to be $11,155,845.

(Working Capital.)

Upon this subject I am unable to agree with the report, further than to express my belief that the complainant usually has on hand about $3,000,000 worth of bills receivable and cash, and some $516,000 worth of bills payable outstanding. But it does not follow that so large a proportion of its capital account should be entered as working capital. That phrase means the amount of cash necessary for the safe and convenient transaction of a business, having regard to the owner's ordinary outstandings, both payable and receivable; the ordinary condition of his stock, or supplies in hand; the natural risk of his business and the condition of his credit; and unless these matters, and perhaps others, be looked into, no comparison can be drawn between one business and another, or even between those of the same general nature. The security of complainant's business is fairly shown by the fact that for the time of inquiry, in a gross business of over $13,000,000, bad and doubtful debts amounted to less than $83,000, and final profit and loss adjustment less than $30,000.

Complainant's credit is of the highest, and its own Comptroller should, I think, be the best judge of its own necessities; and his measure of working capital in the sense of cash is $1,000,000.
614 Six hundred and sixteen thousand dollars is taken as a fair average of outstanding bills payable, and the aggregate of these two sums is as much as the Comptroller claimed, until, on suggestion, he added $2,000,000 thereto to represent the average amount of outstanding bills receivable. To assert that a concern with such credit as complainant, with small percentage of loss, and a plant completed and paid for, needs as working capital not only the amount of its average outstandings payable, and $1,000,000 in cash, but enough more to make its average bills receivable equal to cash, is going too far. A fair working capital for complainant is $1,616,000, and that figure is adopted.

(*Coal & Coke Company and Astoria Establishment.*)

The first of these items denotes complainant's method of disposing of coke and some other by-products. Such disposition is made through a corporation legally independent, but whose entire stock is owned by complainant. The by-products in question are sold to such corporation, whose capital stock is the $50,000 reported, and on that capital stock complainant receives a 10 per cent. dividend, which is entered in the income account.

The second item represents a method of capitalizing, for the purposes of this case, the gas heretofore purchased by complainant from other manufacturing gas companies in or near Manhattan. It appears that, for the period of inquiry, the maximum product of complainant's own works was about ten and a half billion feet per annum. It has sale for about three billion feet more, and this additional quantity it bought from other gas companies, whose stock was, at the time of purchase, and still is, either wholly or partly owned by complainant. This condition was looked upon both by complainant and the vendors of the gas (so far as the latter had any independent view at all) as temporary; and, while this cause proceeded before the Master, complainant was erecting on Long Island a plant of
615 the most modern construction, capable of furnishing not only the annual three billion feet of gas purchased from other producers, but a billion feet more. Such projected addition to the gasmaking equipment of New York and vicinity was to be, and was while in process of construction, the property of the Astoria Light, Heat and Power Company, all of whose stock was and is owned by the complainant, and whose works will, when completed, be as completely identified with complainant's enterprises, as is the comparatively insignificant Coal and Coke Company.

Complainant therefore claims that because the Coal and Coke Company is no more than its "cartage department," and the Astoria company will be no more than a gas plant capable of supplying it with what it has hitherto been obliged to buy from others, therefore both should be here regarded as much a part of complainant's assets as any retort or holder of its plant.

To me it is clear this procedure is without warrant of law. Complainant does not employ in its gas manufacturing business a single tool of the Coal and Coke Company, nor a single machine of the Astoria Company. Its investment in those companies is represented legally by so many certificates of stock; its relation to them is that of a stockholder only; each is bound by law to maintain a separate existence and conduct a separate business.

The argument *ab inconvenienti* is often strong, and it has been inquired here, why should complainant be bound to go through the idle form of taking money out of one pocket merely to put it in another, and treating (for example), the Astoria Company as an independent organization when it really is not. The sufficient answer to this argument is that the law does not permit this species of con-

venience; and while it still does permit the existence of many
616 controlled corporations, it is highly necessary for the proper investigation and possible regulation of all corporations, affected by a public use or engaged in interstate commerce, that the affairs of the controlling and controlled organization shall be kept distinct. And just what complainant, doubtless from very good business motives, is endeavoring here to have recognized by the Court is in my judgment plainly against public policy.

In the case of the Astoria Company, it is also I think a sufficient answer to the capitalization proposed, that there was no such company actually doing any business during the period inquired into. It had a legal existence, and the complainant was in effect subscribing to its stock; but it had no manufacturing agreement with complainant and was an enterprise incomplete and merely projected.

Further, there is no better reason for this suggested capitalization than there would have been had the Astoria plant never been planned, and complainant looked forward to permanent purchasers from its other controlled corporations. In the New Amsterdam Gas Company complainant is almost the only shareholder, and from that corporation much of complainant's extra gas was obtained. It might just as well be asked that some portion of the plant of the New Amsterdam Company (*i. e.*, that part which by hypothesis was sufficient to manufacture the gas sold by it to complainant) should be capitalized, as representing something upon which complainant was entitled to a fair return from its gas manufacturing and distributing business.

Because, therefore, the proposed capitalization of the two items now under consideration is contrary to law; is not, in the case of the Astoria Company, based upon any actually existing investment at the time of inquiry; and because it is misleading, in not truly stating the facts; those capital items are excluded.

617 It results, from these findings, that the value, as of the time of the beginning of this suit, of complainant's tangible property, invested in and representing the business sought to be regulated by the statutes and order in question, is as follows:

Real Estate	$11,155,845
Plants	15,500,000
Mains	12,636,000
Services	1,994,000
Meters and miscellaneous	4,100,000
Working capital	1,616,000
Total of tangible assets	$47,001,845

In seeking an answer to the ultimate question in litigation such as this, *i. e.*, what is the capital (in the sense of assets not share capital) upon which the complainant is entitled to a fair return, the other inquiries suggested by *Smyth vs. Ames, supra*, have not been forgotten. But in this cause I do not find that the original cost (where ascertainable) of complainant's tangible property affords any assistance. The time of acquisition is too long ago, and condi-

tions have so wholly changed, as to render comparisons useless. Nor is any consideration of share capital advantageous. Were the complainant engaged in no other business than manufacturing and distributing gas on Manhattan Island, the extent, value, time and cause of issue of its share capital would be material and relevant inquiries. But its holdings of the stocks of other companies (both those engaged in gas lighting and heating, and in other pursuits) are so extensive, that it is impossible to say more than that its entire capitalization does not seem disproportionate to its entire business; how much of said capitalization is represented, or should properly be represented, by its own gas manufacturing business, can only be ascertained by a valuation of its assets, and the only
618 portion thereof that has been, or can be, valued herein, is so much as is affected by the regulation complained of.

Nor do I think the price, as shown by recorded quotations, paid for the stock and securities of complainant during the last twenty years is of the slightest value. The stock has apparently been at times the subject of speculation; the recorded prices have varied so widely as to render any safe conclusion impossible; and the only result I can reach, from the consideration of these figures, is that at times the recorded prices are out of all proportion to the possibilities of the gas business, and at other times have reflected unwarranted lack of confidence in the possibilities of the same.

Having pursued, therefore, as did the Master, what I believe to be the only method of investigation practicable in this case, I conclude that complainant is entitled, as matter of law, to a fair return, from the business of manufacturing and selling gas, on $47,000,000 worth of tangible property.

(*The Second Question of Fact Tried Before the Master, i. e., Cost to Complainant of Production and Distribution of Gas.*)

Complainant's method of proving expense of manufacture and operation is to show actual disbursements for the year ending October 31, 1905, and for the calendar year 1905. The items in detail are shown in the report. No reason appears to doubt that these disbursements were made during the times specified and for the purposes set forth. Whether the purpose for which any particular sum was expended related solely or partly to the gas business, is not wholly a question of fact, when the circumstances are known; and it is always to be remembered that the ultimate use of this cost statement is *not* to prove what it cost complainant to make and distribute gas in 1905, but what, under ordinary circumstances, and
619 with a reasonable allowance for contingencies, will be such expense in the near future.

To the method pursued, it is objected that the investigation covered too short a period. If the statement propounded had not been compared, as to its most important items, with the experience of former years, and with that of other companies in other cities, there would be more force in the argument; but as matters are, I think the Court has been furnished with sufficient facts. A summary

of what complainant deems its ordinary annual operating expenses may be condensed from the report, as follows:

Cost of gas at station (*i. e.*, ready for delivery to holder)	$3,445,091 37
Net cost of gas purchased from other companies	893,432 49
Cost of distribution (*i. e.*, from factory to consumer)	1,589,700 67
General expenses	2,807,040 66
Total	$8,746,265 19

It appears to me that this method of statement is in one respect misleading, and that some of the objections to the general expense account are well founded.

(*The Method of Statement.*)

The item "Cost of Gas purchased from other Companies" is not, in any way, an expense of operating complainant's gas factories or distributing its own gas. Much time was spent in showing the amount of each sub-item of station, distribution and general expense per thousand feet of gas manufactured and sold. In making these computations complainant has apportioned its distribution and general expenses, not to the gas it manufactured, but the
620 gas it sold, including that bought (as hereafter more fully stated) at bare station cost from other companies. This procedure apparently reduces the price per thousand cubic feet, by increasing the number of units to which expenses other than station cost are apportioned, and conceals the actual cost of manufacturing and distributing the ten and a half billion feet, which represent the maximum capacity of complainant's own works.

It is hardly too much to say that this procedure was the excuse for attempting to increase the tangible assets of the caiptal account, by adding the Astoria plant; and there is an apparent injustice or illogicality in considering income and receipts and disbursements, unrelated to any item of capital. Something seemed necessary to represent the investment from which flowed the profits of selling purchased gas. It appears, however, that it would have cost substantially as much to distribute the ten and a half billion feet, which complainant made, as it did to distribute the thirteen and a half billion feet sold during the period of inquiry; it entailed no measurable expense to pass the additional three million feet through holders, mains and services; and the fact is that the business of selling purchased gas was proportionately far more profitable than that of selling gas of the vendor's own manufacture. The two operations should be regarded as separate, though related, businesses; and having ascertained the tangible assets engaged in both manufacture and distribution, it is logical next to discover the normal expense of distributing the product of those tangible assets, before taking up any other branch of business. From the statement of complainant's operating cost, therefore, I think the item of "Gas purchased from other Companies" should be eliminated.

(*Specific Objections to Items of General Expense.*)

Interest on taxes, $94,506.29.

621 Doubtless this expense was incurred in 1905, and as a penalty for withholding certain taxes laid by the State of New York, which have been and still are being contested either as to amount or validity. The propriety of complainant's action in withholding payment has been attacked; but I think without success, considering the present condition of the tax laws of this State, and the results flowing from a voluntary payment of contested taxes.

But in such litigation as this there is an insuperable difficulty in allowing this item, viz.: it is not and cannot be a permanent expense. The effect of allowance would be to regard this sum as a part of the usual running expenses of the business, and, whether in the future taxes were or were not paid when due, to fix this disbursement as a permanent item of expense in the manufacture of gas for an indefinite period.

Of the same nature is the cost of a legislative investigation into the gas business; a sum expended in 1905 and amounting to $25,671.74.

A third and similar item is the expense of litigation over franchise taxes during the same year, being the amount ($63,401.65) expended in attacking the validity of chapter 712 of the Laws of New York for 1899, and the propriety of taxes laid thereunder. In twenty years legislative investigations have been few, and the validity of the Franchise Tax Law has been established by the Supreme Court of the United States.

The effect of allowing the last three items is to capitalize them, and the statement of that result is enough to require their disallowance.

As pointed out while considering the real estate item of capital account, complainant cannot treat as property employed in its gas business real estate not actually used, nor clearly shown to be

622 intended for immediate use in such business. It follows that the expense of property not so employed cannot be treated as a permanent item of expense of manufacturing and distributing gas. For this reason the general expense account must be further lessened by the proportion of taxes paid upon such realty, computed as $29,071.00.

(*The Principal Objection to Complainant's Statement of Operating Cost.*)

This may be conveniently called the "Ten cent item."

It is admitted that some allowance must be made for the accidents and contingencies of this, as of any other business; and complainant therefore demands that in addition to treating as permanent disbursements what it actually paid out during the period of inquiry for repairs and renewals to its plant, mains, services and meters, there should be allowed to it a reserve or contingent fund of ten cents

per thousand feet of gas sold, or, at the existing price of a dollar a thousand, substantially ten per cent. of its gross income.

This method of stating the ten per cent. reservation is misleading, and I think unjust to the State. The more gas complainant buys from other companies the greater its volume of sale; but, as pointed out, the expense of maintenance does not increase *pari passu* with increased sales; and the allowance, if granted at all, should be upon the sale price of the maximum production of complainant's own works. This deduction alone would amount to more than $150,000.

The nature of this "ten cent item" may be seen by observing that during 1905 there was actually expended for repairs and renewals, and included in station and distribution cost, the sum of $685,077.47; and this item is to be considered as a permanent allowance for repairs and renewals, amounting, according to the report, to 5.58 cents for every thousand feet of gas sold, in-
623 cluding, of course, the gas purchased from other companies.

Yet in addition to this allowance there is demanded, in permanence, an additional ten cents per unit sold, amounting to $1,328,316.37, to cover the probability of annual repairs and renewals in excess of $685,077.47, and depreciation mediate and ultimate: by which it meant the final replacement of plant and apparatus owing to irreparable decay. This item has been the subject of bitter contest, and after much hesitation I am unable to concur in the report.

It appears upon a review of sales of gas and cost of repairs and renewals actually made betwen 1885 and 1905, that the average expenditure for such purposes during that time was 10.89 cents per thousand feet of gas sold. Since 1899 the product of complainant's factories has not been sufficient to satisfy its consumers, and the average if computed only upon gas manufactured, is somewhat higher, but not over 11 cents per thousand. This average of repairs and renewals has for twenty years been sufficient, not only to maintain the plant in a condition of ordinary excellence, but to enable complainant to-day to make more and better gas than ever before, while owning a better plant than ever. The actual payments for these purposes, have often, as in 1905, fallen far below this average. This shows that the expenditure is not constant, while the retention of the large percentage demanded would be so under the plan urged on the Court.

There are certainly legitimate and gainful purposes to which temporarily unexplained balances can be put; and if they are so used an 11-cent reservation on gas manufactured will mean, during the years, much more than 11 cents kept, pending larger demands from the works, without profit from its use.

Again, the 10-cent item may be thus analyzed: In 1905 there was charged to depreciation $282,219.67, while there was ex-
624 pended on new construction $621,264.36, a difference of $339,044.69. Construction represents actual outgo, is chargeable to principal, and must be provided for either by new capital or, what is the same thing, a capitalization of earnings, or by borrowed money. It is not pretended that, as against a regulatory statute, new

construction must be allowed for out of current earnings. Yet under the system of bookkeeping above outlined and shown in the evidence, what happened in 1905 was this: the $621,264.36 was expended; then a year's depreciation was fixed by estimate at $282,219.67; and that amount of construction expenditure was charged to income as depreciation, and is sought to be covered in this 10 cent allowance. The distinction between depreciation of that kind and new construction seems to me very shadowy.

On considering the twenty year average of repairs and renewals, it is observable that the consumption of gas has in that time nearly quadrupled, and the capacity of complainant's own works very largely increased. It follows that the 10.89 percentage, if computed upon the sales for 1885, represents a much smaller sum than does the same percentage on the product of 1905. Yet the number of plants has not increased with increased production. Neither, proportionately, have miles of mains and most other parts of distributing property. Each plant turns out more gas, through interior enlargement and improved methods of production; and there is nothing in the evidence to compel the belief that the same proportion of repair and renewal expenditures to volume of product existed in 1905 as did in 1885; or that the proportion of earlier years is legitimately to be required in the future. And this is true, although the amount of money lately expended, and to be expended, is much larger than twenty years ago.

625 The actual result of this demand, as applied to the facts of 1905, is as follows:

If the ten per cent. reserve were computed only on gas manufacture, it amounted to $1,065,781.03 of cash in hand.

Of this $282,219.67
passed to depreciation and was actually used to lessen expenditure for new construction; and the balance of $783,561.36

should have been credited to reserve against future contingencies. This means that if repairs and renewals could be kept at the figure of 1905, and no more be called depreciation than was used to aid in construction in that year, there would be produced without the aid of investment at interest a fund sufficient to reconstruct complainant's entire plant in twenty years.

No such thing will probably happen, and counsel have argued that this apparent surplus is prospectively dissipated by future increased expenses, and losses of many kinds. Increased expenses are likely to be incurred. The constant rise in the price of most materials and most kinds of labor is something of which even judicial cognizance may be taken; but this inquiry is solely into the reasonableness, and therefore the legality, of the regulatory action in 1906. It is not to be presumed that if circumstances change the regulation will remain unchanged. And if such regulation does remain unchanged, there is nothing in the law as developed down to this time to prevent application to the courts, years after the passage of the regulative statute, upon the ground that what was just when the statute was

passed has become unjust by lapse of time and change of circumstances.

As to future losses of a kind not known in the past, such may well be encountered; it is said, probably with truth, that the crowded condition of underground New York increases for the future the danger of explosion, and introduces a new peril in elec-
626 trolysis resulting from the multiplication of underground electric currents. These are dangers possible; so, somewhat more remotely, are lightning and earthquake. But it cannot be said, as matter of law, that a corporation, even as against its shareholders, has the right to horde income for the sake of maintaining dividends in years when extraordinary disasters may occur. If a prosperous private corporation chooses to set aside for such contingencies an annual fund of ten per cent. of gross earnings, discontented minority stockholders might not be able to coerce the discretion of the directors by judicial proceedings; but their complaint would be entitled to a hearing, and the alleged abuse of discretion strictly inquired into. The case of the company or its directors is far weaker where the endeavor is to capitalize a large proportion of yearly earnings against the undoubted regulatory power of the State.

I am of opinion that some such capitalization of income is proper; but can it be said in this case that a ten per cent. reserve is so universally or even generally approved in manufacturing circles, so necessary for this corporation in the light of its past history, and so clearly shown to be all these things by the evidence herein, as to require the Court to uphold the claim and accordingly seek to limit the regulatory power?

In my view the statement of this proposition is a sufficient answer to it; and I find that complainant has not sustained the burden of showing the general acceptance and reasonable necessity, and therefore the legality of the reserve demanded.

An allowance of eleven cents per thousand feet on the maximum production of complainant's own works to cover repairs, renewals and depreciation mediate and ultimate is in my judgment sufficient.

Making the deductions above discussed, I find complainant's operating cost, for the manufacture and sale of its own product to be $6,799,147.28.

627 *Note.—Summary of Deductions.*

Net cost of gas purchased from other Companies...	$893,432 49
From General Expense Account:	
Interest on Taxes	94,506 29
Taxes on lands not employed in gas business (estimate)	29,071 00
Legislative Investigation expense	25,671 74
Franchise Tax Litigation expense.....	63,401 65

Contingent Fund, computed thus:

Repairs and Renewals of 1905 stated in Station and Distribution Cost	$685,077 47	
"Ten cent item" of report	1,328,316 37	
Total	$2,013,393 84	
"Eleven cent fund" allowed in opinion	1,172,359 10	
Difference to be deducted		841,034 74
Total deductions		$1,947,117 91
Which sum subtracted from		$8,746,265 19
Leaves		$6,799,157 28

as the reasonable cost of manufacturing and distributing complainant's own product.

628 (*Complainant's Income.*)

From the income as reported		$13,730,193 50
There must be deducted for reasons explained above, Dividend on Coke & Coal Co.	$5,000 00	
Rental of leased land	37,408 88	
Proceeds of sale of purchased gas (2,863,702,341 ft. at 99.967 average price)	2,862,757 32	
Total	$2,905,166 20	
Leaving as income from complainant's own products		$10,852,027 30

This sum is more than could be obtained from selling the company's entire product at $1 per thousand, the present price to private consumers, although for some years The City of New York has paid but 90 cents per unit.

The excess arises from the fact that much of the gas sold the City is unmetered, and furnished under contracts requiring complainant not only to furnish the gas but to maintain and repair the lamps, so that the amounts paid for street lighting largely exceeds 90 cents per thousand for the gas consumed.

(*Income from Purchased Gas.*)

The sale price was	$2,862,757 32
Cost at 34.04 c. per M	997,039 89
Profit	$1,865,717 43

Not all the gas, either purchased or made during the period of inquiry was sold during the same period, but the unsold residue is too small to render the calculations erroneous for the purpose
629 of this case, and much less than enough to constitute a proper reserve according to complainant's evidence.

This is the income sought by complainant to be capitalized or represented by the insertion in capital account of the Astoria plant. That is, because the Astoria factory would when finished furnish annually four billion feet of gas, and ultimately do so more cheaply than has yet been done, therefore the cost of the prospective works should be considered as an investment of complainant, employed in its gas business.

The inadmissibility of this contention on legal grounds, has been pointed out already. It remains to consider how the net income from purchased gas is to be treated, in ascertaining the probable entire income of complainant, derivable in the near future, from all its gas business.

The three billion feet purchased in 1905 were obtained from companies all but one of which are almost as completely dominated by complainant as is the Astoria Light, Heat & Power Company, and in that one it owns a majority of the stock. It has used that control or ownership to obtain gas at about holder cost plus ten per cent., such holder cost being slightly below the corresponding figures for complainant's own product.

With the inequity or illegality of this arrangement, as against a minority—however small—of stockholders, we are not concerned, and possibly it has afforded to the selling companies a method of disposing of surplus product. The inquiry here is, whether this business is to be regarded as permanent, and at what figure the purchase price of gas shall be fixed.

That the business is permanent I think obvious. The consumption of gas on Manhattan Island has outstripped the capacity of the factories there situated, and I have already expressed
630 my belief in the unlikelihood of any new factory being there built, and the bad judgment of attempting to do so.

I cannot, however, think it equitable to charge against complainant all the profits derived during the period of inquiry from a method of business, that in its present form cannot and ought not continue. The agreements under which complainant's controlled companies have furnished gas are now expiring; at what price should it be now obtainable from the factory, and by a purchaser which bears every cost of distribution?

It would perhaps be possible to hold complainant to present figures for mere lack of proof—the case having been presented to the Master and Court as if stock ownership produced a merger of the controlled and controlling companies. From a denial of that doctrine it might follow that existing profits, however obtained, should be the basis for measuring the future.

This does not seem quite fair, and I think there is a basis of computation inferrible from the evidence, though not directly testified to.

The three billion feet purchased in 1905 was not enough for complainant's wants. The Astoria plant was calculated for four billion feet, without any reference to a decrease in the price of gas. The increase in consumption during the years when prices were steady at a dollar per thousand was such as reasonably to justify this provision; entirely apart from the necessity for a reserve—which the demands of the consumer have lately made impossible.

The ascertained cost of Astoria is twelve million dollars, and if the expectation of lessened holder cost at that factory be only partially realized, 30 cents per unit is a high figure. If four billion feet be sold annually at 50 cents per unit, and disposed of at
631 a dollar, the profit to the seller represents over six per cent. on the investment, and that to a purchaser who disposes of it by mingling his purchase with his own product, is two million dollars.

Here may be considered the natural imminent increase in consumption; not due to prospective decrease in price, but to advancing population and industrial demands. It is prophesied by complainant's counsel, that electricity is supplanting gas, so that as an illuminant gas is passing away; that the near future will produce light without heat, and that for heating and cooking purposes electricity will soon be a formidable rival, if not a victorious opponent. In some of this there may be truth, yet nothing but time can furnish demonstration; and if the industrial development of the past be any guide, new inventions create new demands, and permit the old and new to flourish side by side. Such has been the history of steam and electricity—the telegraph and the telephone—and thus far, of telegraphy with and without the wire.

For changed circumstances, either of production or consumption, there must be new applications for relief; the business of the Court is to deal with circumstances discoverable in the present, and by evidence. On the evidence, I believe that complainant reasonably could, and did expect when this bill was filed, an annual income from purchased gas bought at a fair price as large as that admittedly shown for 1905.

It follows that income from the gas business for the purposes of this case should be thus computed:

Income from complainant's own product, gross....	$10,825,027 30
Expenses	6,799,147 28
Net.....	$4,025,880 02
Net from purchased gas.....	1,865,717 43
Total net income.....	$5,891,597 45
632 On the volume of sales for 1905, the loss through reduction of price by 20 cents per M. is as reported.....	$2,656,600 00
Net income under legislation here attacked.....	3,234,997 45

It is true that in considering probable income from gas purchased, I have assumed a consumption of the full product of the Astoria plant, or its equivalent; and therefore a total sale of about a billion feet a year over the business of 1905, and that the reduction of price must be considered as to that quantity. Such reduction would amount to approximately $200,000.

I find that from the gas business humanly certain to be done by complainant, under the acts of Assembly in question, its net annual income would not be less than $3,030,000, upon a capital of tangible assets of $47,000,000. This finding allows nothing for increase of sales due to cheaper prices.

(*The Rate of Return.*)

It thus appears that complainant, under the legislative reduction ordered, can earn over six per cent. upon the present value of its investment in tangible property.

If such property only is to be considered, I think this return sufficient to satisfy the law—though the reported decisions do not furnish a plain legal measure of the rights of a party in complainant's situation.

The admitted doctrine (*Covington, &c., Turnpike Co. vs. Sanford,* 164 U. S., 578) that a corporation subject to regulation has no right to earn any definite devidend upon its share capital has no application here, on account of the diversity of reasons for issuing complainant's stock, and the variety of its corporate interests.

633 It is only by ascertaining what complainant has in its gas business, that even an estimate can be made of how large a part of its share capital, represents that business.

Nor can I think that the legal rate of interest in the State of complainant's incorporation or operation affords any light on the subject, merely because it is established by law. As was observed by counsel, equally learned in law and politics, it would be easy to amend the legal rate; and judicial dependence upon an interest rate susceptible of change, by the same Legislature, that regulates the rate of earnings, would be, to say the least, inadvisable.

There is, however, evidential value in the established rate of usance for money, in so far as it expresses the settled conviction of the business community as to the worth of capital invested in enterprises not usually regarded as hazardous.

Neither is the market price of the stock of a corporation in complainant's situation, nor the dividends paid thereon, ordinarily of value to the Court. This company has for twenty years paid dividends averaging over six and under seven per cent., while the price of its shares has at times so risen as to yield but three per cent. to the purchaser at highest rates, and in other years has been below par, although dividends were maintained as usual. These are the vagaries of speculation, or reflections of the necessities of borrowers on collateral and not facts useful in an investigation such as this.

Difficulties of this kind are encountered in every case of rate earning regulation, and I believe the decisions end to-day about

where they began—declaring only that "each case must depend upon its own special facts" (*Covington, etc., Turnpike Co. vs. Sanford, supra*) for discovering whether a rate "prescribed by a
634 legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property" (*Regan vs. Farmers' L. & T. Co.*, 154 U. S., 362).

The question then becomes largely local, and decisions from one part of the country may be of small value in another, where conditions of business life are different. The true note was, I think, sounded in *Milwaukee &c., Co. vs. Milwaukee*, 87 F. R., at 586, where the local rate for approved and non-hazardous securities was taken as the final criterion.

In respect of gas and electric companies, the conditions for the State of New York are, I think, well summarized in the prevailing opinion in *Trustees of Saratoga Springs vs. Saratoga Gas &c., Co.* (Sup. Ct. N. Y., App. Div., Third Dept., Nov. Term, 1907), but they must be further localized in the case of a corporation monopolizing the gas service of the most crowded portion of the largest city in America.

Such a business situation is secured against competition, because the monopoly is beneficial. To have the streets of the Borough of Manhattan torn up to afford room (if room exists) for the mains of a rival, is unthinkable. For the same reason, and because the population and its wants will increase—so far as human foresight can perceive—the amount of business will also increase. So that the inquiry here is, what is a fair and reasonable rate of return upon the most favorably situated gas business in America, not forgetting that all gas businesses are inherently subject to many of the vicissitudes of manufacturing?

Much testimony has been introduced to show that certain investors in gas works well known throughout the country expect to obtain from eight to fifteen per cent. upon the price of what they can buy. Such testimony is not relevant. It must be admitted that investors are entitled to reap large rewards, if they can, from the haz-
635 ards of a new business, or the rebuilding of a broken one. Such ventures are for exploitation, and the day for exploiting the business of selling illuminating and fuel gas in New York City is past—or certainly ought to be.

The exploitation value in this case is represented by the enhancement over cost of land, mains and services; arising from local conditions beneficial alike to this complainant and many other New Yorkers, who by judgment or luck purchased or constructed—perhaps generations ago—what many men desire.

An interest in the gas business of this City is as nearly a conservative investment, as any private manufacturing enterprise can furnish, and although each case depends upon its special facts, there is, after problem conditions are ascertained—one question that can always be asked. What would that prudent man acquainted with business (so familiar to the readers of legal literature) do regarding such an investment, if it were offered to him? I think he would take it, not with enthusiasm—but as fairly safe local property, promising a rate

of return sufficiently above the local mortgage market, to compensate for the additional and non-insurable hazard. He would expect, and have just and reasonable right to expect, a return of six per cent., not because that happens to be the interest rate by law established in the State of New York, but because it is the return ordinarily sought and obtained on investments of that degree of safety in the City of New York.

(*Complainant's Intangible Property.*)

My conclusion that the legislation in question leaves complainant a return of over six per cent. upon the reproductive value of its tangible property in the gas business, renders it necessary to consider the intangible assets of that business and their effect, if any, upon the ascertained return.

636 The Master's report finds it impossible to assign separate values to the two items of intangible assets claimed by complainant, viz.: good-will and franchises, but declares their combined values to be not less than $20,000,000. No more definite findings seemed needful, because the tangible assets found by the report were so large and the expenses of operation so great that the resultant income under the reduced gas rate was less than 4 per cent. upon tangible property alone.

The testimony, however, is sufficiently full to enable the Court to ascertain facts and render it unnecessary to remit the case.

(*Good-will.*)

By the definition of this species of property adopted in *Washburn vs. National Wall Paper Co.* (81 Fed. Rep., at p. 20) good-will is "all that good disposition which customers entertain towards a house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it."

I cannot perceive how this complainant can possess a good-will answering that description. There is nothing in the nature of its business enabling it to acquire good-will in the property sense or indeed in any other. It is required by law to furnish gas to all demanding it with a certain distance of the mains; and it owns the mains, service pipes and meters. What induces a customer to remain with this company, its successor or vendee? Nothing that I can imagine, except a desire to avoid the nuisance of street digging in front of his house, a digging, however, entailing no expense upon him. Yet even this nuisance is in all human probability impossible of occurrence because of the beneficially monopolistic character of defendant's present occupancy of the streets of this City.

637 Nor is there proof in the case of the value of what complainant calls good-will—on which point I agree entirely with the Master.

From the testimony I think it apparent that what is here meant by good-will is the organization of complainant, long established and doubtless well manned and equipped. Such organization is

clearly of value, because without it neither its tangible nor intangible property can be profitably managed. Yet the organization itself is but a method of utilizing that which is invested. It is really dependent for its existence and continuance upon the franchise, without which there can be no useful organization.

Tangible property has a certain value entirely apart from franchise, or right to continue business, or method of transacting business; but good-will in the sense or organization for the business of furnishing gas can have no existence whatever apart or detached from the franchise conferring the necessary privilege.

Would anyone think of capitalizing good-will of this kind and distributing its assumed value in the shape of new shares among shareholders new or old? I think the most ingenious financier could not imagine such a proceeding; and if this good-will be not property capable of such capitalization and distribution I do not think it property capable of capitalization as against the State.

Finally this claim of good-will seems to forget that for many years the price and distribution of complainant's gas has been regulated by law. A citizen is entitled to have a clean street before his house because he pays taxes *inter alia* for that purpose; he is much more plainly entitled to have complainant's gas in his house because the Company must give it to him if he pays for it. I think it apparent that the conceivable good-will of a gas company in this City is about equal to that of the Street Cleaning Department of the Municipal Government.

638 (*Franchises.*)

Under this branch of the discussion the most important and novel question is whether a public service corporation is entitled to add the value of its franchise to the assets from which a fair return may be lawfully demanded.

In this case complainant's proposition may I think be accurately stated thus—the right to place gas mains in the streets of New York and maintain them for private profit is in and of itself something upon or from which an income return may be justly and lawfully demanded; a return different and separable from that derived from all the Company's tangible property or any part thereof.

It is not asserted that any right such as above described was ever bought by complainant from either State or City or that for such right any valuable consideration was ever paid in the usual legal sense of those words.

Indeed the asserted rights all date from that time in American economics when those promoting public works were regarded as public benefactors and the right to serve the public was something thought to be sufficiently paid for by the act of service.

In these later days, however, complainant, finding itself treated rather as a malefactor than a benefactor, brings this action to ascertain *inter alia* whether the latest statutory rate leaves it a fair return not only upon its tangible property, but upon the right to use that property in the gas business, which right is commonly called a franchise.

An an original proposition I believe this claim unsound. Return can be expected only from investment, and he that invests must part with something in the act of investing. He that hath not sown shall not reap; and can it be said that complainant here or any other corporation similarly situated has invested its franchise in its business It did not invest *in* its franchise because it did not pay for it; it did not invest its franchise because it did not part
639 with it in the same way that it parted with money or money's worth in acquiring or creating mains or plants. The investment of property was made not *in* the franchise, but *under* the franchise and on the faith thereof. The franchise is but a part of the power or privilege of sovereignty, allotted to a private person for the benefit of all and only incidentally given for private emolument.

If all franchises so allotted are private property for the purposes of rate regulation, as fully as land or money is private property—the nature of the doctrine is best seen by considering the case of a franchise just granted under which no capital has yet been invested—or one the use of which demands or permits no investment other than personal service or labor.

Thus if a private citizen be now granted the franchise here claimed by complainant, *i. e.*, the right to establish and maintain gas mains in the streets of this city—what is the nature of the property right in such citizen before a main is laid or a foot of gas manufactured? What is its worth apart from performance under it, and how can it be valued at its birth? Yet unless it can be seen to possess inherent value entirely apart from the earning capacity of the subsequent investment or from the actual earnings resulting from such investment the value asserted or claimed is but a duplication of that derived from the use of the tangible property when so invested.

Again, let it be supposed that a citizen be granted a franchise to perform personal service only. The franchise of being a town crier or herald is an historical illustration. Such franchise is not different in kind from that here under consideration. Is there any value attached to that franchise beyond the right of working under its protection for a fair wage? And would the herald be justified in charging two prices for his proclamation—one for his service and the other as return or income on his franchise?

640 I believe the concepts of the nature and value of franchises are seen dimly and confusedly because of the failure to distinguish between productive and non-productive property. Land, money, chattels, may be industry, and intelligence be made productive without a franchise, but no excellence in these desirable qualities can ultimately render a franchise productive without the use of money, chattels and land in conjunction therewith; and when the juncture is made the earning capacity of the real and personal property plus the franchise and plus intelligence and industry is really no greater than it would be without the franchise, for the franchise has added no producing power to the realty or personalty—it has but authorized their employment in a particular way and protected the owners while so employing them.

I can imagine no more than three ways in which the value of a franchise can be stated; it is valuable, 1st, because it authorizes the gainful use of private property in a particular manner; 2d, because once obtained it is often difficult or impossible to get another like it, and 3d, because it may be used to injure or hinder another enterprise, although itself conferring or securing nothing of value.

The third method of statement has been accurately, though colloquially described as "nuisance value," and is so obviously illegitimate as to require no discussion.

The second method of statement when carefully considered, asserts that because the sovereign has deemed it advisable to entrust a public work to one citizen or body of citizens such *quasi* monopolistic grant confers the right to charge for the service more than would be just or lawful were the occupation open to all.

Nor does it change the truth of the last statement that the difficulty of procuring franchises produces and long has produced a traffic in them. On every private sale of franchise property the price paid is so much money lost to the public by official incompe-
641 tence or worse, and such sale can confer on the vendee no right to compel the consumer to repay him a price which should have been paid to the State.

For these reasons I believe that on principle a franchise should be held to have no value except that arising from its use as a shield to protect those investing their property upon the faith thereof, and that considered alone and apart from the property which it renders fruitful, it possesses no more economic value for the investor, than does an actual shield possess fighting value, apart from the soldier who bears it.

The very able counsel who have argued this cause unite in declaring that the exact question here presented makes this litigation a "pioneer case"; and those for defendant have, for reasons as different as counsel were numerous, demanded that the matter be disposed of as one of first impression. It often occurs, however, that upon the presentation of a question absolutely novel in its exact form, the decision of the Trial Court is guided, in the absence of directly controlling authority, by the trend of decision, and methods of reasoning pursued in well considered cases dealing with kindred topics, and even by the dicta of Courts of approved authority, where such dicta indicate, as they often do, a train of thought necessarily suggested by the exact matter in hand. It is this course I must pursue in respect of the broad question of valuing franchises for purposes of rate regulation. How novel it is, exactly as presented, is shown by the silence of most of the text books concerning regulatory rates, and the summary and insufficient treatment accorded the question in the valuable treatise of Messrs. Beale and Wyman, sec. 362.

It is familiar doctrine that private citizens may acquire vested property rights through a series of even erroneous decisions—
642 rights so firmly vested that it becomes unconstitutional for the Court which persisted in error, suddenly to rectify its mistakes to the detriment of those who had securely rested upon

the decisions sought to be invalidated. A Trial Court is in somewhat such a case when confronted with a proposition concerning which as *res nova* it entertains no doubt, but finds it impossible to enforce the opinion entertained, without doing violence to theories of law and habits of legal thought fairly discoverable in preceding decisions of superior jurisdictions. In this case I am compelled to the conclusion that it is necessary to allow the discoverable value of complainant's franchises as part of that capital upon which a fair return must be allowed, because to refuse would disregard views expressed by higher courts regarding the general nature of franchises and regulation proceedings. Instead of attempting to minimize and distinguish the decisions to which I have been referred and many others, it is my duty to follow the method of reasoning there clearly indicated, leaving it to the higher tribunals to make distinctions which, if drawn by the lower court, would in my opinion savor of presumption.

It is not to be denied that such a franchise as that to place and maintain gas mains in city streets is (though secondary in its nature and inferior to the primary franchise of corporate existence conferred by the supreme authority), property "taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain and invested * * * with the attributes of property generally" (*People vs. O'Brien,* 111 N. Y., at p. 41); and the same doctrine in language almost as forceable is laid down in *Monongahela Navigation Co. vs. United States* (148 U. S., 312), which case particularly and especially applied it to an instance of condemnation for a public use of the highest order.

If franchises are to be reckoned with and paid for in con-
643 demnation proceedings, must they also be reckoned with and allowed for in cases of rate regulation? The rights of condemnation and regulation are both confessedly exercises of police power. If regulation is to be regarded as *pro tanto* condemnation, then the same train of reasoning which requires compensation for franchises when all the property protected by the franchise is taken away, requires that some compensation shall be left when the earning power only is reduced. This is the crucial point of inquiry, and the highest tribunal has not yet encountered the necessity of answering.

Yet it was said in *Smyth vs. Ames, supra* (p. 544), that the "apparent value of the property and *franchises* used by the corporation" was *inter alia* to be considered when determining the rates that might reasonably be charged; and in the same case it was asserted as a general proposition that a "corporation may not be required to use *its* property for the benefit of the public without receiving just compensation for the services rendered (p. 546). And there can be no doubt that in the schedule of "its property" the corporation may justly include its franchise. And in the same spirit are the remarks in *Reagan vs. Farmers' Loan & Trust Co.* (154 U. S., at 410), although the word "franchise" is not there used. In that case the proceedings of the Texas Railway Commission were under

review, and how careful those commissioners were in valuing tangible property to the exclusion of franchises, may be seen by the remarks of the Interstate Commerce Commission (I. C. C. Rep., 264). *San Diego Water Co. vs. San Diego* (118 Cal., at 567), was purely a case of rate regulation; and it is there declared that "the question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain, and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use." And in
644 the same spirit are the remarks of Morrow, J., in *Spring Valley Water Works vs. San Francisco,* 124 Fed. Rep., at 594, which was also a case wholly of rate regulation. And this identity of spirit in the two proceedings has been explicitly recognized by this Court upon an application for preliminary injunction in this case (reported 146 Fed. Rep., 150). I think these cases reveal a line of reasoning which may be summed up thus: It is admitted that if property protected by a franchise is condemned and wholly taken away from its owner the franchise must be paid for. If its earning power be reduced by regulation the value of the property is *pro tanto* reduced and since the franchise is property the value of the franchise is also reduced. Therefore in some way the value of the franchise at the time of the proposed reduction must be ascertained, in order to discover how much it contributed to the earnings before reduction, and how much it suffers in common with other property by reason of the reduction. Indeed, it has been asserted, that when the condemnation is absolute the owners may take the value assessed, reinvest it and take their chances of gain elsewhere, while if the condemnation be but partial and through rate regulation, such owners have no option but to continue to own the property and receive the reduced rates; with the result that should no allowance be made for the franchise, owners are in a worse position when regulated than when their property is condemned outright (*Ames vs. Union Pacific Ry. Co.,* 64 Fed. Rep., at 178). It is obviously true that if franchises have inherent value and yet may be disregarded in regulating rates, it would be an easy matter to regulate profits as near the vanishing point as might be necessary and then condemn property whose franchises had been so practically destroyed by regulation, at a price far below its worth were condemnation instituted without antecedent regulation; and this thought is prominent in 146 Fed. Rep., at 157-8.
645 I conclude, therefore, that I am compelled to consider franchises not only as property, but as productive and inherently valuable property, and to add their value if ascertainable to complainant's capital account, before declaring the rate of return permitted complainant by the statutes complained of (See an endeavor to deliminate these two species of property in *Kennebec Water District vs. Waterville,* 97 Me., at 220).

(*The Method of Valuing Franchises.*)

Upon this point, again, the diversity of view manifested by counsel on the same side, reflects the difficulty of the problem; a difficulty accentuated in this State by the existence of the Franchise Tax Law (chap. 712 of 1899). By that act the special franchises or privileges possessed by corporations such as complainant, together with certain kinds of property not taxed either as realty or personalty before its passage (*e. g.*, mains and services), are subjected to taxation. The method of assessment followed in practice is to ascertain the value of all tangible property of a given corporation and the amount of its net earnings, allot to the tangible property a fair return out of earnings, and capitalize the residue thereof, if any, at the same fair rate to ascertain the value of the special franchise. This is undoubtedly an easy and convenient method of assessing the tax, but as a scientific method of ascertaining the value of the franchise it is open to the obvious objection that as long as the tangible property earns anything and the franchise exists, the franchise contributes to the earning power, because it is only by virtue of the franchise that anything at all is earned.

Again, as a method of valuation applied not to taxation, but to rate regulation, the system is reducible to an absurdity, for at what point of time is the inquiry to be made? Clearly before the reduced rate goes into effect. Yet by this method, since the
646 fair rate of return upon tangible property is a constant figure, the capitalization of the residue at the same figure will always give a valuation for the franchise rendering reduction impossible.

As a result of this obvious absurdity, counsel have submitted the argument, equally ingenious and ingenuous that, although the franchise tax law remains unrepealed, New York has by the regulatory statutes here in question abandoned the idea of taxing complainant's franchise, and substituted the scheme of regulating price of output. It should therefore be held, first that no future allowance be made for the payment of any franchise tax, because under this scheme of regulation, value in the franchise disappears and there can be no tax thereon, and second, for the same reason franchises should be excluded from capital account, because by the regulatory statutes their value is altogether extinguished. As an illustration of the difficulty of the subject, the argument is admirable; but to ask the Court to remove from the operating expenses of the company a tax lawfully laid in pursuance of existing statute, on the ground that a subsequent statute extinguished that upon which the tax operated, notwithstanding that the only apparent effect of the Eighty-cent Tax Law was to increase the franchise tax, is a considerable demand upon credulity.

The Master reports that the record contains little direct evidence as to the value of the franchises, and he might have added that if by direct evidence is meant testimony of the same kind regarding their value, as has been offered regarding every item of tangible property, there is none at all.

I think it obvious, as I have endeavored heretofore to point out, that either for the purpose of condemnation or regulation the value of a franchise depends wholly upon what is earned under it; and I believe the best way of finding out how much a franchise separately considered is worth, is to ascertain what those persons desirous
647 of continuing operation under it consider it to be worth.

In a corporation whose stock is freely bought and sold, such value is measured by the success attending the sale of stock based entirely upon capitalization of franchise; yet the value of stock issued only in consideration of the franchise, is obviously dependent on earnings, after the stock based on tangible property has received a satisfactory dividend. This is really the same measure of value that the New York Franchise Tax Commissioners are using, except that instead of that reasonable return upon the tangible assets deemed by the Commissioners sufficient, there is substituted the opinion of the investing or speculative public as to what constitutes a satisfactory rate of return upon all the stock. Thus, if the investment of $100,000 in a franchise protected business, authorized in the opinion of the promoters the issue of $200,000 worth of stock, and such stock for a number of years maintains itself at par, paying satisfactory dividends, it would be obviously fair to assert that in the opinion of the shareholders the franchise is worth $100,000, assuming no appreciation of tangible assets. Yet it will always be true that unless the whole net return, compared with the value of tangibles, is above a satisfactory return on tangible investment alone, the addition of stock issued for franchise will be regarded as "water," and detract from the value of the entire issue, and I think this conclusive proof that value in a franchise depends wholly on what actual investment can earn.

I consider the real reason for that identification of regulation and condemnation proceedings which compels me to consider the value of franchises to be, that for generations it has been the universal practice of American corporations, supported by the opinions of courts and counsel, to capitalize their franchises for all it was thought the traffic or business would bear; until the country is full of shareholders whose certificates of stock are based upon the belief
648 that in some way or other such certificates were legally created pieces of property, and would like other property, be protected by Federal and State Constitutions.

These considerations applied to the testimony herein enable me to find that this complainant did at the beginning of its career measure the value of its franchises. It does not appear how it was done, nor why the figures selected were chosen; but it is true as matter of fact that when complainant was organized in 1884 under a statute which in terms permitted it to acquire the property and franchises of the older gas companies consolidating to form it, it then issued stock of the par value of $7,781,000, representing the franchises it then acquired and nothing else; and this stock is still outstanding and has since 1884 been in the hands of purchasers, who I am compelled to think have a right to rely upon legal protection for legally issued stock.

There is no direct evidence that complainant's franchises in 1884 were worth $7,781,000, or are worth that much to-day. I do not see how such evidence can exist; but because complainant made an arbitrary valuation so long ago, issued stock on the faith thereof, did that lawfully, and has maintained dividends upon that stock ever since, I find it *presumptio juris* that complainant's franchises in 1884 were worth $7,781,000; and to that extent it is certainly entitled to protection against confiscatory regulation.

No capital stock has since been issued upon the faith of franchises only. If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property at the same time was appraised (as appears in evidence) at $30,000,000 (in round figures), then since complainant's business (in sales volume) has in twenty-three years almost quadrupled, and its tangible assets grown to $47,-000,000, it appears to me that a fair method of fixing value
649 of the franchises in 1905 is to assume the same growth in value for the franchise as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,-000,000, a franchise valuation similarly proportioned to $47,000,000 in 1905 would be over $12,000,000.

This I think a logical result from the assumption I am compelled to start with, *i. e.*, that franchises have a separable and independent value. But there is, however, no method of valuing franchises except by a consideration of earnings; earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation; having therefore a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainant's franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent.

This return is neither fair nor reasonable. It is, however, asserted that it is not confiscatory. That it does not confiscate all the income is admitted; but in so far as there is any difference between the promised return and a fair return there is a confiscation of that difference. Authorities need not be cited to show that the Court can neither increase nor diminish the statutory price. It can only judicially decide whether the return is fair, and if it is not fully fair and wholly reasonable there is a confiscation of something, it makes no difference how little. On this point there is nothing to be added to the remarks in *Spring Valley Water Works vs. San Francisco*, 124 Fed. Rep., at 602.

650 (*Existence of the Franchises.*)

It has been strongly urged in this cause that even if franchises are property, and property to be taken into consideration in cases of rate regulation, this complainant does not own any franchise whatever. The arguments on this subject depend upon a careful exami-

nation of the rights conferred both by charter, and contracts with the City, upon the companies which in 1884 united to form complainant. No federal question is involved in this contention. It is one on which it would be the duty of the Federal Courts to follow implicitly the rulings of the State Courts, and I am therefore very loath to express any opinion on the matter. It is sought by complainant to avoid the discussion by stating that this is a collateral attack upon its franchises. I do not think so. If complainant is entitled to have its franchises considered, it is only because the franchise is an item of property, and therefore it must be shown to be at least in the possession of the complainant and actually enjoyed by it at the time of inquiry.

In the case of the land said to be a portion of the street occupied by one of complainants' factories, it was easy enough to prove possession, but whether one can be said to be in possession of a piece of intangible property because he is apparently enjoying some of the earnings therefrom is not so easy to assert.

I do think, however, that the possession of the secondary franchise or right to lay and maintain mains in the major portion of The City of New York can and should be inferred in complainant from the undisputed fact that it long has been and still is being taxed upon these very rights. Of course it is not proof of ownership, any more than paying taxes upon real estate is proof of title to land, but where the tax is laid *in personam* and not *in rem* and by the same authority which now questions the existence of the franchise, it
651 is, I think, conclusive proof of complainant's actual enjoyment of the rights secured by the alleged franchises.

Under the decisions of the highest Court of this State, however, I incline to the opinion that complainant is not only in possession, but in legal enjoyment of, rights enabling it to lay and maintain mains on Manhattan Island. I believe *People vs. O'Brien, supra,* has definitely established the proposition that a franchise survives the legal death of the corporation to which it is granted, and that *Matter of Longacre Electric L. & P. Co.,* 188 N. Y., 361, necessarily holds that a secondary franchise may be assigned and the title thereto may pass from one corporation to another through an individual.

Under these cases complainant is in the possession, enjoyment and ownership of the franchises originally granted to the Harlem Gas Light Company, the Knickerbocker Company and the Anthracite Gas Lighting & Heating Company; and these franchises are sufficient to cover all that complainant does, and permit all it requires for Manhattan Island. Without expressing any opinion as to the other alleged franchises, I consider this finding sufficient to support the value heretofore stated.

It has not been overlooked that according to one of complainant's witnesses $7,781,000 "was considered to represent in 1884 the franchises and business and contracts and patents and good will—everything, in fact, except the tangible property." I consider this undoubtedly true statement immaterial, except as tending to show the difficulty of appraising franchises at all, and the laxity with which all items of intangible property are usually regarded in corporation

management. The overruling consideration is that in 1884 there were issued shares of stock of the par value of $7,781,000; that that stock is outstanding yet, and that it represents a certain fractional part of a business which has enormously increased. Inas-
652 much as everything in that business is accounted for except the franchises, I have taken that figure as indicating the nearest approach to franchise value, given by the evidence, and a proper starting point for computation.

(*The Question of Pressure.*)

On this point I think the testimony amply supports the Master's finding, which is in substance that the pressure required by law is not physically impossible if the entire system of gas distribution in this city be reconstructed. It is a scientific fact incapable of change even by legislation, that pressure in a gas pipe varies with altitude. By the expenditure of about $4,000,000 for construction of mains and valves alone, exclusive of any pumping stations or other apparatus, it might be possible to establish and maintain the pressure called for by these acts. Such a thing is commercially impossible, and even if it were done (of course at complainant's expense), it remains commercially impossible since the other parts of the statutes cut off the surplus income out of which alone complainant could be expected to perform the work. A change by means of new capital would be impossible, because when made it would not add a dollar to income.

(*Penalty Clauses.*)

The Master enters upon a computation of the effect of these penalty clauses in the case of a corporation having about 390,000 customers, and concludes that "said penalties, so far as the evidence shows, are unexampled in extent and severity." This is but confirmation of the finding based on affidavits made when the preliminary injunction herein was granted. I think there is nothing to add to the statements of facts and law set forth at 146 Fed. Rep., page 154. I am of the opinion that the penalty clauses in both statutes are clearly obnoxious to the remarks of Brewer, J., in *Cutting vs. Kansas City Stock Yards Co.*, 183 U. S., 79.

653 (*The Remaining Contentions of Complainant.*)

It does not seem necessary to express any opinion as to whether the statutes under consideration, taken together, are unconstitutionally discriminatory. The findings already made dispose of the case.

This is also true of the contention that the statute creating the Gas Commission unlawfully delegated to that body legislative power. It is enough for the purposes of this case that the order of that Commission laid down and sought to enforce a confiscatory rate for the sale of gas, and the larger question raised in argument is now about

to go before the highest Court of this State in *Trustees of Saratoga Springs vs. Saratoga Gas., etc., Co.* (*supra.*)

The pendency and approaching final disposition of that litigation is an additional reason for withholding comment here.

(*The Jurisdiction of the Court.*)

Defendant's objections under this head may be divided into three:

First, that the question propounded cannot be reviewed because the reduced rate was established (apart from the action of the Gas Commission) by direct legislative act.

Second, that the action as against the Attorney-General of this State is in violation of the 11th amendment; and,

Third, that the action is not well brought in equity.

The proposition (to quote from a brief) that "the reasonableness of a rate regulation is a judicial question only when prescribed by a subordinate body" is, to say the least, somewhat astonishing. As
654 argued, the doctrine is that while a legislature cannot absolutely confiscate, it can, under the guise of regulation, go just short of that point, provided only that such point be reached, not by the action of a commission or subordinate, but by direct legislative fiat.

When this is the law representative government as prescribed by constitutions, both Federal and State, is at an end; and so far as the judicial department of the government is concerned it is sufficient to cite the ruling that it is "both the power and the duty (of the courts) to inquire whether a body of rates prescribed by a legislature *or* a commission is unjust or unreasonable and such as to work a practical destruction to property, and is found so to be to restrain its operation" (*Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362).

As to the argument that this action as against the Attorney-General is in violation of the eleventh amendment, I think it sufficient to observe that it is not sought herein to restrict or enjoin the operation of the criminal law of the State of New York, nor to obtain an injunction against the law officers of State or county preventing them from doing not only what they have not done, but what they are not bound to do. The penalty clauses in the act under consideration *must* be enforced by civil actions and by the defendants, pursuant to section 1962 of the Code of Civil Procedure.

Whatever may be the law, if a legislature first prescribes an obligatory contract for a public service corporation, then makes a violation of that contract a crime, and entrusts the indictment for the punishment thereof to its Attorney-General, the questions suggested by such modern procedure are not here involved; and I think the doctrine of *Smyth vs. Ames* (*supra*), that "a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights

of the complainant is not a suit against the State," still
655 obtains, and has been frequently affirmed, as in *Prout vs. Starr* (188 U. S., 537), and *Mississippi Railroad Commission vs. Illinois Central Railroad* (203 U. S., 335).

The title of Attorney-General makes no difference; there are occasions when he represents and embodies the majesty of the State, and is therefore as secure from suit as is the State itself. But when he is unconstitutionally directed, even by the State, to injure a private citizen or corporation in a proceeding in which the State has no pecuniary interest at all, I am referred to no authority to show that the title he bears permits him to violate the supreme law of the land.

As to the equitable remedy sought being improper, I cannot think it necessary to review the decisions, most of which have been cited already in this opinion. If there was ever an action brought to which the remarks of Harlan, J. (169 U. S., at 517), regarding multiplicity of suits are applicable, this is that case; and a much more difficult and successful application of the remedy by injunction in anticipation of injury by public officials is furnished by *Raymond vs. Chicago Union Traction Co.* (Supreme Ct. U. S., decision October 21, 1907).

It results that the first prayer of the bill must be granted, upon the ground that both of the statutes involved as well as the order of the Commission of Gas and Electricity are in contravention of the 14th amendment of the Federal Constitution; and that the relief asked in the second and third prayers of the bill must also be granted.

December 19, 1907.

CHAS. M. HOUGH, *D. J.*

Endorsed: Circuit Court of the United States, Southern District of New York. Consolidated Gas Company *vs.* City of New York, *et al.* Opinion of the Court. Filed Dec. 20, 1906. John A. Shields, Clerk.

656 Circuit Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
vs.
CITY OF NEW YORK ET AL., Defendants.

On application by all parties for sundry additional findings or expressions of opinion, and by some of the parties for modification of the figures found in the opinion of December 19th, 1907.

HOUGH, *D. J:*

I.

It is admitted by all that in making deductions from the value of complainant's real estate as reported by the Master, some items were deducted which already had been eliminated by the Master,

and also that in making such deductions the values of Mr. Wheelock, one of defendants' experts, were used by the Court, whereas
657 the Master adopted throughout the values of Mr. Preiss, one of complainant's experts.

Through these mistakes the figure given for complainant's realty	$11,155,845.00
is too small by	829,590.00
so that complainant's realty employed in its gas business at values found by the Master, amounts to	$11,985,435.00
This correction increases complainant's tangible assets by the addition of the same sum, and makes the total of such tangible assets	$47,831,435.00
It also correspondingly lessens the deduction of estimated "Taxes on lands not employed in gas business" by (say)	10,405.00
Therefore in the "Summary of deductions" in the Court's opinion the deduction for Taxes on lands not employed in the gas business should not be	29,071.00
but	18,666.00
This correction also increases the "Reasonable cost of manufacturing and distributing complainant's own product" to the sum of	6,809,552.28
For the same reason complainant's net income from the sale of its own product becomes	4,015,475.02

II.

Complainant seeks to have included in the real estate actually used in its gas business, certain premises reported as being worth $338,500, used for the storage of material, for stables and wagon yard; while defendants apply for further deductions from the real estate valuations on the ground that certain of the premises
658 found both by the Master and the Court to be employed in the gas business are only so employed in the sense that certain unused, if not dismantled, machinery, is there situated, or that too much ground has been allowed as being required for certain of complainant's manufacturing plants.

Both of these requests I must decline. Absolute accuracy in such a matter as this is impossible. It is true that complainant must maintain storage arrangements, and have a place to keep wagons and horses; but it is also true that very serious doubts are entertained as to the present utility or future advantage of some of the parcels of property as to which the defendants complain, particularly the so-called 111th Street plant. In the original opinion an endeavor was made to reach an average favorable to the complainant, and after reading the elaborate briefs submitted on this application, and re-reading the testimony concerning the 111th Street plant, I remain of the opinion that the figures reported as now corrected, represent all that complainant can justly ask. Probably these figures cannot be translated into an exactly accurate statement by metes and

bounds of just w[illegible] pieces of real estate are severally and in all their parts emplo[illegible]d in complainant's gas business; but I am convinced that they do represent the present money value of all the land so necessarily employed:—and at very full values.

III.

The Master reported that while by complainant's Exhibit 94 the cost of gas production in 1905 was fully shown, such cost only covered the expense of enrichment from 20 to 22 candle power for the last six months of that year, "while for a full year (there would be required) the addition of 1.83 cents per thousand feet to the cost as stated."

Complainant now urges that by the Court's treatment of the "Ten cent item" in the opinion, this cost of additional enrichment has been taken away from it, inasmuch as the Master did not specifically allow said 1.83 per thousand, but permitted it to be included
659 in the ten cent reserve for future contingencies.

It also appears, that during the last six months of 1905 complainant's gas was maintained at a tested candle power of 24.19, and for the whole year the average was 23.1. Yet complainant declares that inasmuch as the statutes attacked in this litigation require that 22 candles be maintained not only at the testing stations so long used, but at any point on the line and at all times, it became necessary for it to maintain an initial strength of much more than 22 candles in order to meet the requirements of the law. Upon this, as upon all other points involved in this litigation, the burden of proof is upon it; and for the purposes of this application I must regard the penalty clauses regarding pressure, of the acts in question as unconstitutional and void. The question therefore is whether complainant has shown, 1st, that 1.83 is the certain necessary expense of the required enrichment, and 2d, whether remembering the unconstitutionality of the penalty clauses, an average of 23.1 candle power be not sufficient for its purposes and reasonably satisfactory to the law. On both of these points my opinion is adverse to the complainant. I do not think that complainant satisfactorily proved that 1.83 cents was the necessary cost of additional enrichment, and do think that the average candle power of 1905 will be found sufficient to satisfy both the law and commercial requirements. The complainant's request for modification of the opinion in this regard is denied.

IV.

Defendants moved that in conformity with the fact, the testimony of Dr. Humphreys on page 3025 of the record be corrected to read five per cent. instead of six per cent. It is admitted by counsel that five per cent. was actually sworn to by Dr. Humphreys, and this correction is noted on such consent.

660 V.

Defendants move to correct the franchise valuation expressed in the opinion and to have it declared either that the only franchises

to be valued are those asserted by the Court to be owned by complainant, and have the valuation decreased accordingly to some $4,000,000; or to have it declared that the $7,781,000 valuation of 1884 was fixed by ascertaining the then market value of the share capital of the constituent companies and deducting therefrom the appraised valuation of the tangible property of the same, with the result that the franchise valuation of $7,781,000 was based upon nothing more substantial than the residuum of current quoted stock values.

It is not difficult to detect flaws in a finding opposed to the settled opinion of the Judge who happens to constitute the Court; and as to the history of the stock whose par value is $7,781,000, I think enough has been said in the opinion already filed, to give the higher Court a fair view of the way in which it was issued and the manner in which it was viewed by those who created it.

But it does not advance the discussion at all to elaborate the history of such creation and issue. For all that I can see the franchises of 1884 might as well have been valued at twice the amount of the stock then issued on the faith thereof. It was nothing but an attempt to capitalize expected profits; but the attempt now has twenty years' success to justify it.

The fact that I incline to the view that three specified franchises are validly existent, has caused a misconception in the mind of counsel. I expressed, and intended to express, no opinion at all as to other grants made to complainant's predecessor; and little value is attached to the inclination in favor of the three enumerated franchises. It is enough that such grants were made, and complainant is in possession of them for what they may be worth, and under such original grants (to speak of no others), complainant is maintaining mains and services, and distributing gas through the
661 same. Whether the privilege originally granted still exists in its original nature is immaterial. The so-called franchises may be denominated licenses, or tenancies at will or continuing trespasses,—yet what is being done under them is a fact, a profitable thing, and taxable property by the law of this State. The State of New York is estopped from continuing to tax that property by one set of servants, and denying it all value through the instrumentality of another.

VI.

Success has not attended my effort to make clear the view entertained of the Astoria investment.

If the evidence had been regarded only in the same light as was done by those gentlemen who introduced it, the Court would have been fully justified in fixing upon complainant for all purposes of this case, the profit derived from the sale of purchased gas, while excluding from principal account the Astoria investment. And this because it was and is obvious, that for reasons not clearly shown before the Master, complainant was able to purchase nearly one-quarter of its sales volume at 34 cents per unit and sell it at a dollar. It was solely because it seemed equally clear that gas could normally

be obtained only at a higher cost than 34 cents that any computation was entered on.

Complainant now urges that accepting the view of the Court that the Astoria enterprise must be regarded as an independent legal entity, the assumed cost of gas at Astoria is much too small, or, what is the same thing, the profits derivable from the Astoria investment are grossly over-stated.

The inquiry is preliminary and important,—if it was not expected that Astoria would furnish gas at lower rates than either complainant's own Manhattan factories or those of its controlled companies, why was Astoria built? For so far as the capacity of the first unit is concerned, it is also clear that the productive
662 capacity of existing plants owned or controlled would have furnished the additional gas needed.

Yet it was deemed advisable, and could have only been advisable if profitable in expectation,—to borrow $12,000,000 at 6% in order to put up the Astoria plant.

To re-state the problem, adopting in part complainant's present figures: If the annual capacity (four billion feet) of Astoria first unit were sold at a dollar per thousand, gross sales would amount to $4,000,000. If the cost of production at holder be 32 cents per thousand, such cost annually would amount to $1,280,000.

Interest on price of plant at 6% would amount to....	$720,000.
Leaving	$2,000,000.

for profit and general expenses.

Repairs to apparatus, buildings, tools and implements are included in holder cost; if Astoria sold its entire product to complainant, the expense of distributing three billion feet annually is already included in cost of gas to complainant as allowed by the Master and the Court, and there is no evidence requiring the belief that the distribution of a billion feet more, would appreciably increase such distribution expense.

It is asserted in the opinion (in effect) that whereas from the purchase at about 34 cents and sale at a dollar, of three billion feet of gas complainant in 1905 reaped a net profit of $1,865,717.43, it is the Court's belief that the sale of four billion feet procured from the Astoria plant, would yield as large a net profit.

As shown above, such net profit is $2,000,000 subject to deduction for general expenses and taxes.

In other words there is a difference between the probable profit charged against complainant in the opinion, and the $2,000,000 above stated of, $134,282.57 and the real question raised by the application now made is whether this sum is sufficient to cover the taxes and general expenses of a controlled corporation which
663 has but one customer, distributes no gas, and requires no actively employed officials other than those directly concerned with manufacturing.

The estimated annual taxes of the Astoria Company are $90,000, and the question then remains whether some $44,000 be a sufficient annual reservation to pay general expenses. It is to be re-

membered that the plant is new, that the repair items already included in holder cost of gas ought not for some years to be as large as they normally are in older establishments; and that the Court is not required to decide what is legally fair for all time, but only for the present, and some reasonable period of the immediate future. I can only reiterate my relief, after a painstaking reading of complainant's able argument, that unless the expectation of the builders of Astoria be falsified, the sale of four billion feet derived from that plant will yield as large a profit as did the sale of three billion feet purchased in 1905. If such expectation be not realized under careful management, there must be a new application. The Court is bound to apply to the conditions of 1906 not only the facts of that time, but the reasonable expectations then entertained and expressed by men of business sagacity; and while it is impossible to assert that the fears expressed by complainant and reproduced in the figure submitted in argument may not come true, complainant cannot expect any Court to hold back the hand of the legislature because of fears of what the future may bring forth.

VII.

It has been also argued that no justification exists for the assumption made in the opinion that an additional billion feet of gas will or can be sold by complainant in the near future. Reason for this view was found in the past history of gas sales in this City, and I remain of the belief originally expressed, and do not perceive any necessity for further elaboration thereof.

But defendants inquire why should an increase of sales
664 due to a reduction of price be excluded from consideration.

It was not intended to exclude this probability from consideration; it did not seem necessary to enter upon it. I perceive no reason why sales of an additional billion feet may not be easily accounted for by a prospective diminution in price; but I preferred to rest the assumption upon normal increase of population and advance of business as being better justified by the evidence before the Court.

VIII.

The statement in the opinion of the effect of a reduction of price upon the assumed additional sale of a billion feet was evidently not clear. The Master reported the effect of a reduction of price upon the volume of sales for the year 1905, and in his computation the expense of production, and amount of income, gross and net, were all computed upon the same sales volume, *i. e.*, about thirteen billion feet.

By the Court's finding the net income from Astoria gas is the same as that from purchased gas, but in order to produce that identical amount complainant would have to sell an additional billion feet of gas; so that although its income by hypothesis remains constant, the sales of gas required to produce the same have increased by a billion feet. Therefore the reduction of gross income must be measured by a greater sales volume than is set forth in the

Master's report. Such additional sales of a billion feet at a dollar a thousand would produce $1,000,000, and a 20 per cent. reduction in price would amount to $200,000; and this $200,000 must be subtracted from the net income computed on the Master's figures (as modified) before it appears what complainant's net income at 80 cents per unit would be on a volume of sales of fourteen, instead of thirteen billion feet.

IX.

The proper treatment of the amount paid in 1905 by the
635 City of New York to complainant for the care and repair of gas lamps has been again raised in argument. In the Master's report and the opinion the whole amount received from the City is treated as income, and the amount paid for repairs and maintenance of city lamps is treated as an expense.

So far as complainant's Exhibit 94 is concerned I agree with defendants' counsel that there is error in carrying the expense of maintenance and repair of city lamps into the column of cost per unit of gas either manufactured or sold, because such expenditures for maintenance and repair have nothing to do with the cost of the gas that flows through those lamps or any others, and it is largely for this reason that I have preferred to use as the basis for computation, not the cost per thousand of gas, but the cost per annum of complainant's whole gas business.

When so regarded what was paid by the City is charged against complainant, and what was paid out by complainant for the City's account is credited to complainant. As long as that method of dealing with the City continues, such method of statement shows the truth, and shows also complainant's net profits from its whole business. If that kind of business with the City ceases, then both items disappear from the account; but the method of statement remains constant and in accordance with the facts.

X.

Defendants urge that under *Milwaukee etc. Co. vs. Milwaukee*, 87 Fed. Rep., 577, and *Spring Valley Water Works vs. San Francisco*, 124 Fed. Rep., 574, the rate of return should be fixed at 5 per cent. instead of 6 per cent. Beyond stating my belief that such is not the necessary result of these cases, nothing need be added to the discussion of this subject in the opinion already filed, wherein I believe the reasons for the conclusion arrived at are plainly set forth. It is, however, fair to add, as suggested by some counsel, that the 6 per cent. rate has been arrived at in part by taking judicial cognizance of local business conditions.

666 It has not been asserted, and is not believed, that 6 per cent. is a profitable, satisfactory or attractive rate for the investment of capital in a gas business. In my opinion it is none of these things, but it is the lowest rate which in the City of New York can be considered legislatively fair to those who are already engaged therein and cannot readily escape.

XI.

The defendant Public Service Commission moves that the final decree herein "shall require the complainant to do equity by voluntary reducing as of May 1st, 1906, the price of gas furnished the private consumer, to the lowest rate which would be constitutional under the ruling of the Court; and that if complainant should refuse to do equity as aforesaid no injunction be granted by the decree except as against the enforcement of the pressure provision and of the penalties."

It is an attractive suggestion to urge upon a Court desirous of ending litigation, some method of preventing the lack of definite result which characterizes rate litigation. The work of the judiciary has seemed for the most part destructive rather than constructive, and when at the end of a protracted and expensive contest there is but a negative proved, viz: that a certain rate is not fair and reasonable,—it is left for all parties to begin over again to do something concerning which all the facts were shown in the litigation just ended.

Yet this is not necessarily the case. It may be true, and I believe it is true in this instance, that facts may be shown from which a fair and reasonable rate can be deduced,—but that was not the issue. The question made by the pleadings was not what would be a fair rate, but whether a certain particular rate was fair, and whether under the limitations of legal evidence it is ordinarily possible in judicial proceedings, and under such issues as were framed in this case, to ascertain what is a fair rate, may I think well be doubted.

667 Also in this case (assuming the right to grant defendants' motion), I am not inclined to exercise discretion in favor thereof. If the Court were to name a fair rate it would necessarily be based upon the sum of the values of the tangible and intangible properties of complainant. The making of the motion presupposes the possibility of complainant yielding to the proposed pressure, and this would prevent a settlement in the only Court which can settle it, of the question concerning the nature of franchises as property—a question on which I respectfully intimated my own view; and the correctness of error of that view is more important than the private rights of any party hereto.

Finally it appears the more plainly for discussion that the practice suggested by the motion is but an indirect method of doing, or trying to do, that which the Supreme Court has frequently said no Court can do, *i. e.*, make a rate. If one be invited to do that which he cannot lawfully be compelled to perform, and the invitation be coupled with a threat, the distinction between such invitation and illegal compulsion, is too refined to be sound. This motion is therefore denied.

It results that the modifications or changes in the original opinion may be summarized as follows:

The value of complainant's tangible assets is.....	$47,831,435.
That of its intangible assets not less than.....	12,000,000.
Total	$59,831,435.
Upon which there may be expected a net annual income under the legislation attacked herein of..	$3,024,592.45

C. M. HOUGH, *D. J.*

March 10, 1908.

Endorsed: United States Circuit Court, Southern District of N. Y., Consolidated Gas Company of New York, *vs.* City of New York *et al.*. Opinion supplementing that filed December 9, 1907, Hough, D. J., March 10, 1908. U. S. Circuit Court, Southern District of N. Y., Mar. 11, 1908. John A. Shields, Clerk.

668 At a Stated Term of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Post Office Building, in the City of New York, on March 31, 1908.

Present: Hon. Charles M. Hough, District Judge.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

Final Decree.

This cause came on to be heard at the stated October 1907 term of this court and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

I. The report of the Master herein is confirmed except in the following particulars, as to which the exceptions to said report are sustained and its findings modified:

(*a*) The real estate valued by the Master at $13,461,000 included certain parcels held by Complainant for future use but not at the date of the beginning of this action actually in use by it, and its gas business; and omitting from the capitalization of Complainant for the purposes of this suit such unused parcels, the valuation of the portion of such real estate actually and necessarily employed
669 by it in its gas business at said date is hereby fixed at $11,985,435.

(*b*) The valuation of the "Working capital" must be reduced

from $3,616,000, at which it was fixed by the Master, to $1,616,000, at which amount it is hereby fixed.

(*c*) The capitalization as fixed by the Master must be further reduced by striking out therefrom the item "Coal & Coke Co. $50,000;" and from the statement of net earnings for the year 1905, as contained in the Master's Report, there must be correspondingly deducted the "National Coke & Coal dividend $5,000.00."

(*d*) The capitalization as fixed by the Master must be further reduced by striking out therefrom the item "Astoria, *i. e.* capital invested in production of gas secured from other Companies $12,000,000."

(*e*) The capitalizaton as fixed by the Master must be further reduced by striking out therefrom the item "Franchises and good will $20,000,000;" and for said item there should be substituted the sum of $12,000,000, the Court finding that the valuation of the intangible special franchises of the Complainant is at least that sum.

(*f*) The following items allowed by the Master in his estimate of the Complainant's operating cost must be disallowed:

Interest on taxes	$94,503.29
Legislative Investigation expense	25,671.74
Franchise Tax Litigation expense	63,401.65

(*g*) The following items amounting in all to $2,013,393.84 were allowed by the Master in his estimate of the Complainant's operating cost, to-wit:

Repairs to	Apparatus	$169,197.39
do	Buildings	24,900.69
do	Tools and Implements	16,228.48
do	Gas Stoves	55,954.35
do	Mains	126,110.31
do	Services	89,033.46
do	Meters	172,925.52
do	Buildings	15,116.68
do	Tools and Implements	15,610.59
Contingent Expense (includes renewals)		1,328,316.37
Total		$2,013,393.84

The fact and propriety of said expenditures for "repairs" is not questioned, but the final item of $1,328,316.37 is be-
670 lieved to be larger than required; and in place of said aggregate sum of $2,013,393.84 there should be an allowance of eleven cents per thousand cubic feet on the actual production of Complainant's own works to cover repairs, renewals and depreciation mediate and ultimate, amounting to $1,172,359.10.

(*h*) The Court finds the gross income, operating expense and net income of Complainant's gas business for the calendar year 1905, upon the basis of the prices charged for gas during that year, to be as shown in the following tabulation in lieu of the Master's tabulation of "net earnings for the year 1905" resulting in the figure $4,983,928.31:

Income from Complainant's own product, gross...	$10,825,027.30
Expenses	6,809,552.28
Net	$ 4,015,475.02
Net from purchased gas.....	1,865,717.43
Total net income	$5,881,192.45

The Court finds that said sum of $1,865,717.43 represents more than a normal profit upon the volume of purchased gas, in that the amount paid by Complainant to other companies for the same ($997,039.80) was paid under temporary and expiring agreements and did not include any reasonable recompense or return upon the value of the investment required to produce said gas.

The Court estimates that owing to a probable increase in sales of gas and in cost of gas obtained from other companies, and probable change in the source of manufacture of some portion of such gas, while the total net income for the year beginning May 1, 1906, (being the date when chapter 125 of the Laws of 1906 of the State of New York took effect, and when this action was begun) would remain the same upon the basis aforesaid, yet if the price of gas were reduced as provided by chapter 736 of the Laws of 1905 and chapter 125 of the Laws of 1906, both of the State of New York, the net income of Complainant for said year beginning May 1, 1906, would be reduced to the sum of $3,024,592.45.

The Court deems it unnecessary to make express findings as to the present existence of the franchises claimed by Complainant by derivation from the New York Gas Light Company, the
371 Manhattan Gas Light Company, the Municipal Gas Light Company and the Metropolitan Gas Light Company, and therefore does not pass upon the Master's findings as to the same but finds that those claimed by it by derivation from the Knickerbocker Gas Light Company (including the Anthracite Gas Lighting and Heating Company and the so-called State Grant) and the Harlem Gas Light Company exist and are owned by the Complainant, and are sufficient to meet all its requirements.

II. The true valuation, as of the time of the beginning of this suit, of the Complainant's property actually employed in its business of manufacturing and supplying gas is as follows:

Real estate	$11,985,435
Plants	15,500,000
Mains	12,636,000
Services	1,994,000
Meters and miscellaneous	4,100,000
Working capital	1,616,000
Total of tangible assets.....	$47,831,435
Special franchises	12,000,000
Total.....	$59,831,435

The foregoing items do not include the amount of Complainant's investment in the securities of other gas companies, from which companies it was obtaining a large part of the gas which it delivered to its customers, nor the value of the property of such other companies or any part thereof employed in the production and delivery to complainant of such gas.

III. The lowest rate of return which can be considered legislatively fair, just or reasonable, upon the value of the property employed by Complainant in the business of manufacturing and supplying gas, is six per cent., at which conclusion the Court has arrived in part by taking judicial notice of local conditions in the City of New York; and under the two Acts and the order, copies of which are annexed to the bill of complaint as Exhibits A, D and C, to wit Chapter 736 of the Laws of 1905 of the State of New York, Chapter 125 of the Laws of 1906 of said State and the order of the Commission of Gas and Electricity of the State of New York, made on the 23rd day of February, 1906, and directed to the Complainant, the net annual income which the Complainant can earn upon the property employed in its gas business as aforesaid is less than six per cent.

IV. The pressure required by said two Acts and the order aforesaid is not physically impossible if the entire system of gas
672 distribution in the City of New York be reconstructed; but compliance with such requirement is commercially impossible under the rates for gas prescribed by said two Acts and order.

V. Complainant has no adequate remedy at law for the injury which would result from the threatened enforcement of either of the aforesaid acts or of the aforesaid order, and such injury would be irreparable; and this suit is not a suit against the State of New York, either as against the defendant Attorney General or as against the defendant District Attorney, or as against the defendants the Public Service Commissioners aforesaid.

VI. The two said Acts and the order mentioned in the bill of complaint, viz: Chapter 736 of the Laws of 1905 of the State of New York, entitled, "An Act in relation to the price of illuminating gas furnished or sold to The City of New York, and providing a penalty for violation"; Chapter 125 of the Laws of 1906 of said State, entitled, "An Act in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers, other than said City, and providing a penalty for violation"; and an order of the Commission of Gas and Electricity of the State of New York, made on the 23rd day of February, 1906, and directed to the Consolidated Gas Company of New York, copies of which were annexed to the bill of complaint herein, are each of them hereby declared and adjudged to be illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that they take Complainant's property without due process of law and without just compensation and deny to Complainant the equal protection of the law.

VII. The defendant the City of New York and each of its officers,

agents, servants and employees are perpetually enjoined and restrained from suing for the penalty or forfeiture described in said chapter 736 of the Laws of 1905 or in any other way enforcing or attempting to enforce the said Act against this Complainant.

VIII. The defendants William S. Jackson as Attorney General of the State of New York and William Travers Jerome as District Attorney of New York County and each of them, and each of their agents, servants and employees, are perpetually enjoined and restrained from suing for the penalty or forfeiture described in said chapter 125 of the Laws of 1906 or in any way enforcing or attempting to enforce the said Act or the order of the Commission of Gas and Electricity aforesaid against this Complainant.

673 IX. The defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District and each of them, and each of their agents, servants and employees, are perpetually enjoined and restrained from applying for a mandamus or injunction to compel compliance with said chapter 125 of the Laws of 1906 or with said order of the Commission of Gas and Electricity or in any other way enforcing or attempting to enforce the said act or the order of the Commission of Gas and Electricity aforesaid against this Complainant.

X. It is further adjudged that the Complainant recover of the defendants its costs and disbursements, to be taxed by the Clerk, one-half thereof to be paid by the City of New York and one-half thereof to be paid by defendent William S. Jackson, as Attorney General of the State of New York; and that said costs, so to be taxed, include the repayment to the Complainant of the amount of fees and disbursements of the Special Master paid from a fund heretofore directed to be paid into Court by Orders dated May 18, 1906 and June 16, 1906.

XI. Any party hereto may make application at the foot of this decree; making such application by supplemental bill or otherwise as such party may be advised; for any relief to which such party feels lawfully entitled, by reason of change of circumstances since the beginning of this suit.

C. M. HOUGH, *D. J.*

The public Service Commission, is so far as costs are concerned, but another name for the City. This suit has been Defended in equal parts by representatives of the State and City and the costs should be divided accordingly. If the Atty. Gen. can be sued as such, costs can be awarded against him also as such. This question had better be settled.

C. M. HOUGH, *D. J.*

3/31/08

Endorsed: Hough, J. United States Circuit Court Southern District of New York. Consolidated Gas Company of New York, Complainant, against William S. Jackson, as Atty. Gen'l *et al.*, Defendants. Final decree. Shearman & Sterling, Solicitors for Com-

plainant. 44 Wall Street, N. Y. U. S. Circuit Court Southern District of New York. Filed April 3 1908. John A. Shields, Clerk.

674 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York, and Others.

Petition for Appeal.

Come now the defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, conceiving themselves aggrieved by the final decree heretofore made and entered by this court against them and in favor of the complainant, and having filed with the clerk their assignment of errors, pray this court to allow an appeal to the Supreme Court of the United States from said decree, and that a certified transcript of the record upon which said decree was made be transmitted to said court.

Dated April 14, 1908.

GEO. S. COLEMAN,
Solicitor for said Appellants.

Allowed this April 14, 1908.

C. M. HOUGH,
Dist. Judge.

675 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York, and Others, Defendants.

Assignment of Errors by Defendants William R. Willcox et al.

And now on the 14th day of April, 1908, come the defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, and say that in the record and proceedings in the above-entitled cause there is manifest error in each and every one of the following particulars, to wit (the statute of 1906 hereinafter referred to being the statute known as chapter 125 of the Laws of the State of New York for 1906, and the paragraphs hereinafter referred to being the paragraphs of the final decree as numbered and lettered therein):

I. In adjudging that said statute of 1906 is illegal and void and

enjoining these defendants from enforcing the same, said adjudication being erroneous for the following reasons:

676 (*a*) Because the record does not contain sufficient evidence to show whether or not the price of eighty cents per thousand cubic feet for gas, permitted by said statute, afforded a sufficient rate of return upon the capitalization of any of the other companies doing business in the same territory with the complainant, or upon that of a company well located and equipped, economically managed and not over-capitalized, but the case was decided on the theory that if a statutory maximum price does not afford in the opinion of the court a sufficient rate of return upon the present capitalization of a particular company doing business in the territory, the statute is void as to that company, irrespective of its effect upon the other companies doing business therein, or upon a company well located and equipped, economically managed and not over-capitalized.

(*b*) Because the record does not contain sufficient evidence to show the reasonable and necessary operating expenses of the complainant, evidence of its actual disbursements during the period from November 1, 1904, to December 31, 1905, inclusive, supplemented in part only by experience of other periods, being insufficient for that purpose.

(*c*) Because the capitalization upon which the court's calculation is based is an estimate of present value, or of cost of repro-

677 duction, or of partly present value and partly cost of reproduction, not limited to the cost of complainant's property, or to the amount actually invested as capital by complainant and its predecessor companies.

(*d*) Because, it is accompanied by no condition that the complainant reduce its rate to such sum as the court finds to be constitutional.

(*e*) For the further reasons hereinafter stated.

II. In fixing (Paragraphs I*a*, II) the valuation of the portion of complainant's "real estate" actually and necessarily employed by it in its gas business at $11,985,435 (it appearing that its plants, mains, services, and special franchises are not included in its real estate as such term is used in the decree); said valuation being excessive for each of the following reasons:

(*a*) It is in excess of the original cost of such real estate to the complainant and its predecessor companies.

(*b*) It is in excess of the amount required for complainant's gas business upon the basis of cost of reproduction.

(*c*) It duplicates in part the valuation given by the court to the plants, since it could not be realized until the plants thereon were removed.

678 (*d*) In estimating value the court adopts valuations given by testimony for the complainant, whereas the valuations testified to by unimpeached expert witnesses for the defendants, as well as complainant's own book values, and those stated by it in its Tax reports, were lower.

III. In finding (Paragraphs I*e*, II) that the valuation of the intangible special franchises of the complainant is at least the sum of $12,000,000, whereas

(*a*) The complainant owns no special franchises not terminable at the will of the State of New York or of the City of New York.

(*b*) The franchises claimed by it, if owned, are not proper subjects of valuation for the purpose of ascertaining its capitalization.

(*c*) The record does not sustain the valuation given.

IV. In finding (Paragraph I*h*) that the sum of $1,865,717.43, therein stated, represents more than a normal profit upon the volume of purchased gas, and in particular

(*a*) In finding that the amount paid by complainant to
679 other companies for the same was paid under temporary and expiring agreements, whereas only a part of said gas was supplied under said agreements, and whereas said agreements did not expire until after the termination of the year beginning May 1, 1906; and

(*b*) In finding that said amount did not include any reasonable recompense or return upon the value of the investment required to produce said gas, which finding is not supported by the record.

V. In finding (Paragraph I*h*) that while the total net income for the year beginning May 1, 1906, would remain the same upon the basis of the prices charged for gas during the calendar year 1905, yet if the prices for gas were reduced as provided by the statute of 1906 and by chapter 736 of the Laws of 1905 the net income of complainant for said year would be reduced to the sum of $3,024,592.45, on the ground that such finding is speculative and not supported by the record; and, in particular also

(*a*) In finding a probable increase in sales of gas tending to a reduction as aforesaid.

(*b*) In finding a probable increase in cost of gas obtained from other companies, leading to such reduction.

680 (*c*) In finding a probable change in the source of manufacture of some portion of such gas, leading to such reduction.

(*d*) In overlooking the decrease in "Expenses" due to the reduction in the complainant's special franchise tax, payable to the State of New York, which would result from the diminution of its net profits through reduction of its rate for gas, said special franchise tax item being included by the court in the "Expenses" of 1905 to the amount of $406,909.23, as shown by the Master's report.

VI. In failing to make an express finding as to the present existence of the franchises claimed by complainant by derivation from the following corporations respectively (such failure in the case of each of such companies being separately assigned for error), whereas the court should have found that as to each of said franchises the complainant is no more than a holdover occupant, whose right of occupancy is terminable at the will of the State of New York or of the City of New York;

(*a*) The New York Gas Light Company.

(*b*) The Manhattan Gas Light Company.

(*c*) The Municipal Gas Light Company; and this alleged franchise was at all times invalid on account of lack of authority
681 in the Mayor, Comptroller and Commissioner of Public Works to grant it.

(*d*) The Metropolitan Gas Light Company.

VII. In finding (Paragraph I *h*) that the following franchises claimed by complainant exist and are owned by it and are sufficient to meet all its requirements (such finding in the case of each of such companies being separately assigned for error), whereas

(*a*) The alleged franchise claimed by derivation from the Anthracite Gas Lighting and Heating Company through the Knickerbocker Gas Light Company was invalid on account of lack of authority in the Board of Aldermen to grant it, and the alleged assignment thereof to the Union Gas Light Company was also invalid for lack of authority to assign it, and said alleged franchise in any case expires on September 17, 1913.

(*b*) The franchise claimed by derivation from the so-called State Grant through the Knickerbocker Gas Light Company was not assignable to, and did not even purport to be assigned to, complainant or either of its alleged predecessor corporations, and said franchise did not cover any part of the City of New York, Borough of Manhattan, south of 79th Street.

682 (*c*) The franchise claimed by derivation from the Harlem Gas Light Company expired February 1, 1905, and as to that franchise complainant is but a holdover occupant, whose right of occupancy is terminable at the will of the State of New York or of the City of New York, and said franchise did not cover any part of the City of New York, Borough of Manhattan, south of 79th Street.

VIII. In finding (Paragraph II) the valuation of the complainant's plants actually employed in its business of manufacturing and supplying gas to be $15,500,000; said valuation being excessive, being based upon an estimate by complainant's witnesses of the cost of reproducing the plants as they now stand, instead of the lesser cost of replacement with plants of more modern character, which would perform equal service, and being greater than the cost thereof, and than the value thereof as stated by it in its tax reports.

IX. In finding (Paragraph II) the valuation of complainant's mains to be $12,636,000, said valuation being excessive for each of the following reasons:

(*a*) It is in excess of the original cost of such mains to the complainant and its predecessor companies.

(*b*) In estimating value the court adopts the highest
683 valuations given by complainant's witnesses, which valuations are greater than other valuations previously given by said witness and than complainant's own book valuations, and than the valuations stated by it in its tax reports.

X. In finding (Paragraph II) the valuation of complainant's services to be $1,994,000, said valuation being excessive for each of the following reasons:

(*a*) It is in excess of the original cost of such services to the complainant and its predecessor companies.

(*b*) In estimating value the court adopts the highest valuations given by complainant's witnesses, which valuations are greater than other valuations previously given by said witnesses and vastly

greater than complainant's own book valuations, and than the valuations stated by it in its tax reports.

XI. In finding (Paragraph II) the total value of complainant's tangible assets employed in its business of manufacturing and supplying gas to be $47,831,435 and of its total property so employed to be $59,831,435.

XII. In finding (Paragraph III) that the lowest rate of
684 return which can be considered legislatively fair, just or reasonable, upon the value of the property employed by complainant in the business of manufacturing and supplying gas, is six per cent.

XIII. In finding (Paragraph III) that the net annual income which the complainant can earn upon the property employed in its gas business as aforesaid is less than six per cent.

XIV. In finding (Paragraph IV) that compliance with the requirement in the statute of 1906 and in chapter 736 of the Laws of 1905 as to pressure is commercially impossible under the rates for gas prescribed therein.

XV. In finding (Paragraph V) that complainant has no adequate remedy at law for the injury which would result from the threatened enforcement of the statute of 1906 and that such injury would be irreparable; whereas complainant would have an adequate remedy at law as against the enforcement of said act by these appellants, the members of said Public Service Commission, by defense to any application brought by them in the courts of the State of New York for a mandamus or injunction to compel com-
685 pliance; complainant's remedy as against the enforcement of penalties (as to which these appellants have no right, duty or interest), if said penalties are so great as to render proceedings for their enforcement at present inequitable, being by injunction against the enforcement of the clause concerning penalties, said clause being separable.

XVI. In finding (Paragraph VI) that the statute of 1906 is illegal and void.

XVII. In enjoining and restraining (Paragraph IX) these appellants, the members of said Public Service Commission, and each of them, and each of their agents, servants and employees, from applying for a mandamus or injunction to compel compliance with said statute of 1906, or in any other way enforcing or attempting to enforce the same.

GEO. S. COLEMAN,
Solicitor for said Appellants.

Endorsed: United States Circuit Court, Southern District of New York. Consolidated Gas Company, Complainant, against William S. Jackson *et al.*, Defendants. Petition for Appeal and Assignment of Errors. George S. Coleman, Solicitors for Appellants William R. Wilcox *et al.* U. S. Circuit Court, Southern District of New York. Filed April 14, 1908. John A. Shields, Clerk.

686 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

Bond.

Know all men by these presents, that we, the Public Service Commission of the State of New York, for the First District, as principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, as surety, are held and firmly bound unto the Complainant above-named in the above-entitled action, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States; for the payment of which sum, well and truly to be made, we bind ourselves, and each of us, and our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 14th day of April, Nineteen hundred and eight.

Whereas, on the 3rd day of April, 1908, a decree was entered in the above entitled case in the Court aforesaid, in favor of the Complainant and against the Defendant on the merits in said cause; and

Whereas, the Public Service Commission of the State of New York for the First District, is prosecuting an appeal from said decree to the Supreme Court of the United States, and this bond is executed for the purpose of perfecting said appeal.

Now, therefore, the condition of the above obligation is such, that if the said Defendant and Appellant, the Public Service Commission of the State of New York, for the First District, shall prosecute its said appeal to effect, and answer all costs that may be awarded against it if it fails to make its plea good, then this obligation to be void; otherwise to remain in full force and virtue.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
[SEAL.] By WM. MCCARROLL, *Acting Chairman.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney.*

687 STATE OF NEW YORK, *County of New York ss:*

On this 14th day of April 1908 before me personally came William McCarroll the acting Chairman of the Public Service Com-

mission for the First District to me known and known to me to be such acting chairman and the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same, as acting chairman aforesaid.

[SEAL.] LE ROY T. HARKNESS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

688 STATE OF NEW YORK, *County of New York, ss:*

On the Fourteenth day of April, in the year 1908, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720 of the Session Laws of the State of New York, for the year 1893. And the said Hugh M. Allwood further said that he is acquainted with James R. Kingsley, and knew him to be the Attorney of said Company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company in the City of Baltimore, State of Maryland, on the seventh day of February, A. D., 1906, on motion, it was unanimously

"*Resolved*, That Henry B. Platt, Vice-President, or James R. "Kingsley, Attorney, or Frank H. Platt, Edward T. Platt, Joseph "A. Flynn, and Hugh M. Allwood, Attorneys-in-Fact of this Com- "pany, in the State of New York, be, and each of them is, hereby "authorized and empowered to execute and deliver any and all "bonds or undertakings for or on behalf of this Company, in its "business of guaranteeing the fidelity of persons holding places of "public or private trust and the performance of contracts other than "insurance policies, and executing or guaranteeing bonds and other "undertakings required or permitted in all actions or proceedings "or by law required, and to attach thereto the seal of the Company, "the same to be attested by the said James R. Kingsley, Attorney of

"the Company, or by either one of the other persons above named, "as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney, of the Fidelity and Deposit Company of Maryland, has compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 14th day of April, 1908.

[SEAL.] JAMES R. KINGSLEY, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, March 31, 1908.

Resources.		*Liabilities.*	
Real Estate	$757,000 00	Capital Stock	$2,000,000 00
Stocks and Municipal Bonds	2,842,990 00	Surplus	2,421,185 45
U. S. Government, Railroad and other Bonds	1,467,750 00	Premium Reserve	799,509 62
British Consols	222,750 00	Reserve for Taxes (Accrued)	13,774 46
Net Premiums Due	218,638 81	Reserve for Contingent Claims	492,718 60
Cash in Bank, etc	191,879 11	Reserve for Claims Adjusted (Checks out)	2,764 09
Plant, Equipment and Material, Contract at Amsterdam, N. Y.	28,944 30		
Total	$5,729,952 22	Total	$5,729,952 22

STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says that he is the Attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of March 31st, 1908, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 14th day of April, 1908.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County.

689 [Endorsed:] 10245. U. S. Circuit Court, Southern District of N. Y. Consolidated Gas Company of N. Y., Complainant, against William S. Jackson, as Attorney General of the State of New York, *et al.*, Defendants. Bond. I approve of the within Bond and of the sufficiency of the security therein. Dated Apr. 14, 1908. C. M. Hough, D. J. Fidelity and Deposit Company of Maryland, 2 Rector Street, New York. U. S. Circuit Court, Southern District of N. Y. Filed Apr. 14, 1908. John A. Shields, Clerk.

690 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

To the above named complainant and all defendants other than the appellants below named, Greeting:

You are hereby cited and admonished to be and appear at a Term of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, on the 12 day of May, 1908, at 12 o'clock M. of said day pursuant to an appeal filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, are appellants, to show cause, if any there be, why the decree entered in the above entitled
691 court and cause on the 3rd day of April, 1908, should not be reversed and set aside and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14 day of April, 1908.

C. M. HOUGH,
U. S. Dist. Judge.

Service of above citation and of petition of appeal and assignments of error this day admitted.

SHEARMAN & STERLING,
Solicitors for Complainant.

Apr. 15, 1908.

Service of above citation petition and assignment of error this day admitted.

W. S. JACKSON,
Attorney General of the State of New York.

April 16, 1908.

ROBT. C. TAYLOR,
Solicitor for William Travers Jerome,
As District Attorney of New York County, Defendant.

FRANCIS K. PENDLETON,
Solicitor for The City of New York, Defendant.

692 [Endorsed:] E. & A. C. 2720. United States Circuit Court, Southern District of New York. Consolidated Gas Company, Complainant, against William S. Jackson, as Attorney General of the State of New York, and Others, Defendants. Citation. U. S. Circuit Court, Southern Dist. N. Y. John A. Shields, Clerk. Filed Apr. 20, 1908.

693 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney-General of the State of New York, and Others, Defendants.

Petition for Appeal.

Now comes the defendant, The City of New York, conceiving itself aggrieved by the final decree heretofore made and entered by this Court against it and in favor of the complainant on the 3d day of April, 1908, and having filed with the Clerk its assignment of errors, prays this Court to allow an appeal to the Supreme Court of the United States from said decree, and that a certified transcript of the record upon which said decree was made be transmitted to said court.

Dated May 11, 1908.

FRANCIS K. PENDLETON,
Corporation Counsel, Solicitor for Appellant,
City of New York.

Allowed, May 12, 1908.

C. M. HOUGH,
U. S. D. Judge.

694 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney-General of the State of New York, and Others, Defendants.

Assignments of Errors by Defendant, The City of New York.

And now on the 11th day of May, 1908, comes the defendant, The City of New York, and says that in the record and proceedings in the above-entitled cause, there is manifest error in each and every one of the following particulars, to wit (the statute of 1905 hereinafter referred to being the statute known as chapter 736 of the Laws of 1905 of the State of New York, the statute of 1906 hereinafter referred to being the statute known as chapter 125 of the Laws of 1906 of the State of New York, and the paragraphs hereinafter

referred to being the paragraphs of the final decree as numbered and lettered therein):

First. In adjudging and decreeing in paragraph VI. of said decree that said chapter 736 of the Laws of 1905 of the State of New York, entitled "An Act in relation to the price of illuminating gas furnished or sold to The City of New York, and providing a penalty for violation," is declared and adjudged to be illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it takes complainant's property without due process of law and without just compensation, and denies to complainant the equal protection of the law. Said paragraph of said decree being erroneous for each of the reasons and causes set forth in the Assignments of Errors from fifth to
695 one hundred and seventh, inclusive, one hundred and fifteenth to one hundred and twenty-second, inclusive, hereinafter enumerated, each of which is separately alleged as a ground of error in said paragraph VI. of said decree.

Second. In adjudging and decreeing in paragraph VI. of said decree that said chapter 736 of the Laws of 1905 of the State of New York, entitled "An Act in relation to the price of illuminating gas furnished or sold to The City of New York, and providing a penalty for violation," is declared and adjudged to be illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it takes complainant's property without due process of law and without just compensation, and denies to complainant the equal protection of the law, because the rate fixed as the price to be paid by The City of New York for gas by said act does not allow to the complainant a just and proper return upon its properties employed in the production and distribution of such gas, said paragraph of said decree being erroneous for each of the reasons and causes set forth in the Assignments of Errors from fifth to one hundred and seventh, inclusive, one hundred and fifteenth to one hundred and twenty-second, inclusive, hereinafter enumerated, each of which is separately alleged as a ground of error in said paragraph VI. of said decree.

Third. In adjudging and decreeing in paragraph VI. of said decree that said chapter 125 of the Laws of 1906 of said State, entitled "An Act in relation to illuminating gas in The City of New York and regulating the quality and pressure thereof and the price to consumers, other than said City and providing a penalty for violation," is declared and adjudged to be illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it takes complainant's property without due process of law and without just compensation, and denies to complainant the equal protection of the law. Said paragraph
696 of said decree being erroneous for each of the reasons and causes set forth in the Assignments of Errors Nos. fifth to one hundred and seventh, inclusive, one hundred and fifteenth to one hundred and twenty-second, inclusive, hereinafter enumerated, each of which is separately alleged as a ground of error in said paragraph VI. of said decree.

Fourth. In adjudging and decreeing in paragraph VI. of said decree that said chapter 125 of the Laws of 1906 of said State, entitled "An Act in relation to illuminating gas in The City of New York and regulating the quality and pressure thereof and the price to consumers, other than said City, and providing a penalty for violation," is declared and adjudged to be illegal and void because in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it takes complainant's property without due process of law and without just compensation, and denies to the complainant the equal protection of the law, because the rate fixed as the price to be paid by said act does not allow to the complainant a just and proper return upon its property employed in the production and distribution of such gas. Said paragraph of said decree being erroneous for each of the reasons and causes set forth in the Assignments of Errors Nos. fifth to one hundred and seventh, inclusive, one hundred and fifteenth to one hundred and twenty-second, inclusive, hereinafter enumerated, each of which is separately alleged as a ground of error in said paragraph VI. of said decree.

Fifth. In adjudging and decreeing in paragraph II. of said decree that the true valuation as of the time of the beginning of this suit, of the complainant's property actually employed in its business of manufacturing and supplying gas is as follows:

Real estate	$11,985,435 00
Plants	15,500,000 00
Mains	12,636,000 00
697 Services	1,994,000 00
Meters and miscellaneous	4,100,000 00
Working capital	1,616,000 00
Total of tangible assets	$47,831,435 00
Special franchises	12,000,000 00
	$59,831,435 00

whereas said paragraph of said decree should have found and decreed that the amount and value of the complainant's properties so used by it was $30,949,327, as stated in the report of said Master, made up as follows:

I. Real estate	$10,587,685 00
II. Plants	9,348,692 00
III. Mains	6,529,035 00
IV. Services	1,222,228 00
V. Meters and miscellaneous	3,261,687 00
	$30,949,327 00

and in sustaining in this respect and to this extent the report of the Master in Chancery herein and in overruling this defendant's first exception in this respect and to this extent to said Master's report. Said paragraph of said decree being erroneous for each of the reasons and causes set forth in the Assignments of Errors Nos. sixth to sixty-

ninth inclusive, hereinafter enumerated, each of which is separately alleged as a ground of error in said paragraph II. of said decree.

Sixth. In assigning to the properties of the complainant employed by it in the production and distribution of gas, in reaching the valuations set forth in paragraph II. of said decree, upon which a return is to be allowed, their present values based on the cost of duplication, less depreciation, instead of their present values based on their actual cost, less depreciation, the former admittedly
698 exceeding the latter, and such excess representing money never actually expended; and in sustaining the report of the Master in Chancery in this respect and to this extent and in overruling in like respects and extent the exceptions of this defendant to the report of said Master in Chancery, said finding and assignment of values being erroneous for each of the reasons and causes specified in Assignments of Errors Nos. ninth to thirty-fifth inclusive, hereinafter set forth, each of which is separately assigned as grounds of error in this respect.

Seventh. In assigning to the properties of the complainant employed by it in the production and distribution of gas in reaching the valuations set forth in paragraph II. of said decree, upon which a return is to be allowed, their present values based on the actual cost of reproducing the identical plant at the present time, without regard to whether the same was economically worth reproducing or was obsolete or inadequate, instead of taking the reproduction cost of a modern plant, capable of producing and distributing the same kind, quantity and quality of gas, taking cognizance of the advancement of the art and the benefits to be derived from modern construction, which would be taken advantage of by a competitor entering the field; and in sustaining the Report of the Master in Chancery in this respect and to this extent and in overruling in like respects and extent the exceptions of this defendant to the Report of said Master in Chancery, said finding and assignment of values being erroneous for each of the reasons and causes specified in Assignments of Errors Nos. Ninth to Thirty-fifth inclusive, hereinafter set forth, each of which is separately assigned as grounds of error in this respect.

Eighth. In assigning to the properties of the complainant employed by it in the production and distribution of gas, in reaching the valuations set forth in paragraph II. of said decree, upon which a return is to be allowed, their present values based on the cost of reproducing the identical plant at the present time without
699 regard to whether the same was economically worth reproducing or was obsolete or inadequate, instead of taking as a basis a sale value of such plant at the present time from the standpoint of an intending purchaser, giving due regard to inadequate, insufficient and obsolete plant, and the value of the complainant's plant to an intending purchaser who has as an alternative an opportunity of entering as a competitor and constructing a new up-to-date plant, advantageously located, with all the benefits to be derived from modern construction, and in sustaining the Report of the Master in Chancery in this respect and to this extent and in overruling in like respects and extent the exceptions of this defendant to the Report of

said Master in Chancery, said finding and assignment of value being erroneous for each of the reasons and causes specified in Assignments of Errors Nos. Ninth to Thirty-fifth inclusive, hereinafter set forth, each of which is separately assigned as grounds of error in this respect.

Ninth. In sustaining the Report of the Master in Chancery finding:

"The amount of the capital and assets of the complainant as of June, 1884, exclusive of working capital in the shape of cash, accounts receivable and current supplies, was made up as follows:

Real Estate	$10,332,000 00
Plant	12,175,000 00
Mains	5,217,000 00
Services	1,005,000 00
Meters	1,195,000 00
Office Furniture and Fixtures	70,000 00
	$29,994,000 00
Franchises and Rights	7,781,000 00
	$37,775,000 00

700 "The figure at which these assets were acquired by the complainant company and upon which its books were opened was accordingly $37,775,000;"

whereas said Master should have found that the figure at which these assets were acquired by the complainant company was $20,942,632.85, and in overruling in this respect this defendant's second exception to said Master's Report.

Tenth. In sustaining the Report of the Master in Chancery allowing the complainant's amendment 1., page 146, of Report, and in finding:

"As regards mains and services, therefore, as well as real estate, plant and other tangible property, it does not appear that any sufficient ground exists for the suggestion that the appraised value of 1884 was materially, if at all, in excess of the aggregate cost of the tangible property to the constituent companies;"

whereas he should have found that by said consolidation in 1884 the capital of complainant was arbitrarily written up over the capital of the six constituent companies, by the amount of over $17,000,000 on the basis of the market valuation of the stock of the constituent companies, without any expenditure of cash for such increase; that the appraisal of 1884 exceeded the then value of the property as carried on the books of the constituent companies by taking the duplication value as estimated by themselves as distinguished from the cost less depreciation as the basis; that such transaction cannot in equity be considered a purchase of the property by the complainant from its six constituent companies; and if so considered, said complainant paid in excess of its real value therefor, and such excess

cannot be included in an investment on which a return is to be allowed, and in overruling the second exception of the defendant to said Master's Report in this respect.

701 *Eleventh.* In sustaining the Report of the Master in Chancery allowing the complainant's amendment XI., and in finding

"XI.—Page 141, following line 12, insert: 'Although in my view, as above expressed, of the basis of valuation upon which the complainant is entitled to a return, no additional findings on that subject are necessary, for the further information of the Court I find upon the evidence that the *actual cost* to complainant of the tangible property and franchises employed in its gas business (including the amount found by me to be the capital invested in production of gas for complainant outside complainant's Manhattan works) is at least $60,214,000, made up as follows:

I.	Real estate, at least	$9,322,000 00
II.	Plants (Manhattan), at least	14,579,000 00
III.	Mains, at least	7,852,000 00
IV.	Services, at least	1,212,000 00
V.	Meters and miscellaneous, at least	3,802,000 00
VI.	Working capital, at least	3,616,000 00
VII.	Coal and Coke Co	50,000 00
VIII.	Astoria unit (*i. e.*, capital invested in production of gas sold by complainant, made outside complainant's Manhattan works)	12,000,000 00
IX.	Franchises and rights	7,781,000 00
	Total	$60,214,000 00

If franchises and good will be included together at the aggregate value of $20,000,000, above found by me, in lieu of the item of "Franchises and Rights," the actual cost to complainant of its
702 tangible property, plus the value of its franchises and good will, is at least $72,433,000,' "

and in overruling in this respect this defendant's second exception to said Master's Report.

Twelfth. In sustaining the report of the Master in Chancery allowing the complainant's amendment XII and in finding

"There is no satisfactory evidence that the cost to complainant of said property was unreasonable or excessive; or that the cost of production of said property was enhanced through faulty construction or waste; or that the various sums expended from time to time by complainant or its predecessor companies in permanent improvements and betterments were not intelligently and properly expended, or that any such expenditure was made otherwise than providently and honestly.

" 'Nor is there any satisfactory evidence that any of the expenditures of the complainant for material, labor or otherwise, in the manufacture and distribution of gas, have been improper, unnecessary or unreasonable;' "

and in overruling in this respect defendant's second exception to said Master's Report.

Thirteenth. In sustaining the report of the Master in Chancery, refusing to find, in accordance with the written request of the defendant, the Attorney General and adopted by this defendant, as follows:

"That the cost to the constituent companies of its several classes of property, without appreciation or depreciation, was as shown by the books of the constituent companies, $20,942,632.85, and that the item of $7,781,000.00 did not represent anything of value, but was an arbitrary figure used for the purpose of equalizing stock values, as shown by the market prices between the constituent companies;"

703 and in overruling in this respect this defendant's second exception to the Master's Report.

Fourteenth. In sustaining the report of the Master in Chancery finding that the complainant is entitled to a return on the present value of its real estate, as distinguished from its original cost, that although

"By far the greater part of the real estate belonged to the constituent companies before the consolidation and was purchased many years ago at prices much below its present value"

still complainant was entitled to a fair return upon the amount of the increase in value of its real estate holdings or of the unearned increment thereof.

Whereas, he should have found that the value on which the complainant was entitled to a return was such cost value to the six constituent companies up to consolidation and to the complainant since then for such land acquired since, less the amount received for sales of any real estate; that the difference between such cost and such present value represents the appreciation thereon, due to local conditions in Manhattan, and not to any increase in investment by the complainant, and amounts to an unliquidated surplus which can be determined as soon as the property is sold, and both before and after such sale cannot be treated as other than a surplus, and it is not proper to allow a return thereon as against the consumer; and in overruling in this respect and to this extent this defendant's Fourth Exception to said Master's report.

Fifteenth. In sustaining the report of said Master in Chancery finding that there was no competent proof showing that the original cost of the real estate owned by the complainant was as stated, only the sum of $4,118,267.38, and that so far as the record discloses it is quite evident that the actual cost was in excess of that sum.

704 Whereas he should have found that said sum did represent substantially the cost of such real estate as carried on the books of the constituent companies; and in overruling in this respect the Fifth Exception of this defendant to said Master's report.

Sixteenth. In sustaining the report of said Master in Chancery finding

"In the second place, if the question of original cost is to be considered, it should be the cost to the complainant, the Consolidated Gas Company, and not the cost shown on the books of its constituent companies, some of which had acquired their property fifty years and more before the complainant was organized. The cost to the Consolidated Company was represented by the amount of stock it issued to the constituent companies for their real estate, which, as already stated, was $10,332,000. It may possibly be that this amount was in excess of the fair market value of the property at that time, but the record indicates that the discrepancy, if any, was by no means as large as the defendants have argued."

whereas he should have found that such value did not represent the true cost of the real estate on which if at all the complainant was entitled to a return, but that such true cost was the original cost to the constituent companies of the real estate acquired before consolidation; and as to real estate acquired since consolidation the cost to the complainant. That by the mere act of consolidation in 1884 the complainant was not entitled to increase its real estate investment on which a return is demanded, without any additional outlay of cash; and in overruling this defendant's Sixth Exception to the report of said Master in Chancery.

Seventeenth. In sustaining the report of the Master in Chancery finding

"Whatever enhancement there may have been in its value
705 since the date of purchase was the result of no efforts on the part of consumers of gas, and they are not equitably entitled to a return thereon. Whether it was the result of mere good fortune or was due to the shrewdness and foresight of the management of the company is immaterial; in either case, the justice of permitting the general public to share its benefits at the expense of complainant's stockholders is not apparent."

whereas he should have found that whatever enhancement there may have been in its value since the date of purchase was the result of no effort on the part of the complainant, but, according to complainant, was due to "Divine Providence and the growth of The City of New York" for the reason that the complainant is not entitled to include such enhancement in the gas investment on which the consumer must provide a return, but may get the benefit of such enhanced value upon the sale of such property when it will be treated as a surplus and it must be so treated prior to liquidation, that to do so imposes no burden upon the complainant, as the taxes are paid by the consumer during the time the property is held, and that to do otherwise would be to impose a greater burden upon the consumer, which would in time enable even a dollar rate to be held confiscatory, since the investment on which the return is figured would be continually enhancing; and in overruling this defendant's thirteenth exception to said Master's report.

Eighteenth. In sustaining the report of said Master in Chancery finding

"In this instance, as well as regards the three items next to be considered, such reproductive cost affords the only practicable basis

of present valuation. While the real estate has a substantial value irrespective of the purposes for which it is now held, the plants, mains, etc., are of value only when used by a going concern.
706 For any other purpose they are merely scrap, or second-hand machinery, and their intrinsic worth is inappreciable. As to their market value, there is no means of judging. Dr. Marks, it is true, testified that his valuations were made from the standpoint of an intending purchaser desiring to take over the plants and operate them as a whole. But any such purchaser in order to continue business must own complainant's franchises in addition to its tangible property, else the tangible property would have no substantial value (People *ex rel.* Consolidated Gas Co. *vs.* State Board, etc., 174 N. Y., 417, 440).

"There is no evidence as to the market value of any of complainant's property taken in connection with its franchises, and disposed of as part of a going concern. Furthermore it is clear that a valuation that might be proper as between purchaser and seller would not necessarily be a fair one for the purposes of the present case. The evidence shows without contradiction that capitalists purchasing entire gas properties expect a return on their investment of at least 10 or 15 per cent., which much exceeds any rate conceded by defendants to be a proper return to complainant. On the other hand, a capitalization on the basis of reproductive cost, seems fair to all parties. Complainant receives a return on the present value of its property as used, while the consumer pays no more than he would be required to pay had complainant abandoned business, or a new company entered the field as its competitor."

whereas he should have found that the only practicable basis of the persent valuation (if such present valuation is to be taken), is the standpoint of the intending purchaser, and not the reproductive cost view, that the former is the fairer method, as between the par-
707 ties, as does not enable the complainant to burden the consumer with increased cost for depreciated, old-fashioned or inadequate machinery, but gives such machinery a fair value only; that other franchises than the complainant's can be obtained from the proper authorities upon application, that nothing appears from the record that such a new franchise would require any original outlay; that no franchise would in fact be required for the manufacture, as distinguished from the distribution of gas; that a return on the present value of complainant's property as used, based on cost of duplication, burdens consumer by requiring him to pay a return on a value in excess of complainant's real investment, that such consumer would then pay more than if a competitor entered the field, as such competitor would not duplicate the antiquated and old-fashioned plants of complainant, but would construct an ideal plant to meet the given output; that the taking of duplication cost of complainant's plants as basis, imposes upon the consumer all the burdens without giving any of the benefits of the competition theory; and in overruling this defendant's Fourteenth Exception to the report of said Master in Chancery.

Nineteenth. In sustaining the report of said Master in Chancery finding that the complainant is entituel to a return on the present

value of the plant, based on the cost of reproduction, and not on the original cost less depreciation, whereas he should have found that where such present value based on the original cost less depreciation, is less than the present value based on the reproduction cost, that the complainant is entitled to a return as against the consumer only on the smaller amount. Otherwise the consumer is burdened with paying a return on money never spent, and deprived of benefits accruing from duplication by an ideal plant, while no injustice can accrue to complainant in allowing a return on its actual investment at its present condition; and in overruling this defendant's Fifteenth Exception to said report of said Master in Chancery.

708 *Twentieth.* In sustaining the report of said Master in Chancery finding the value of the mains of the complainant on which it is entitled to a return as against the consumer, to be the replacement value based on the cost of reprouction of the same.

whereas said Master should have found said value of the mains to be the actual cost of investment therein by the complainant, less the depreciation, as the only fair basis between the complainant and the consumer, otherwise the consumer is charged with the burden of providing a return on an amount in excess of the actual investment of the complainant due to increased cost resulting from modern conditions, pavements, etc., without the consumer receiving the benefits which replacements, at the present time, under the present conditions, would give. That in no sense can the mains of the complainant, many of which have been in the ground for fifty years, be said to be at the present time of a greater value than the actual cost, merely because modern conditions would not permit duplication of such identical mains at the same cost at the present time; and in overruling this defendant's Eighteenth Exception to the said report of said Master in Chancery.

Twenty-first. In sustaining the report of said Master in Chancery refusing to find that the appraisal value of both mains and services at the time of consolidation in 1884, was far in excess of their cost; and that the value of mains and services devoted by complainant to the public use was as of December 31, 1905, $6,359,-324.46, which represents the original cost of mains and services transferred by the constituent companies to the complainant plus the expenditures of the complainant since 1884 on account of new construction thereof.

whereas he should have found that such figures represented the then value of such mains and services on the basis of cost
709 less depreciation, as carried on the books of the constituent companies, and that any figure in excess of such amount which the complainant claimed therefor at that time was in excess of the real value of such mains and services and such excess should not be included in the investment on which a return is to be allowed, for the reason that it does not represent a cash outlay by the complainant, and any capital stock issued for such excess by complainant was unwisely and wastefully issued; and in overruling the

Twentieth Exception of this defendant to the report of said Master in Chancery.

Twenty-second. In sustaining the report of said Master in Chancery finding that the complainant is entitled to a return from the consumer on an amount for services based on the cost of reproduction at present prices; whereas he should have found that if the basis of present value is to be taken, no amount at all could be charged by the complainant, as such services are no longer owned by such complainant, inasmuch as so much thereof as are in the public streets are considered as separate from the franchises, and the balance thereof are on private property and belong to the owners of said property, and that it is only when the basis of actual cost, less depreciation, is adopted that any amount for services can be included by the complainant in the amount on which a return is to be provided by the consumer; and in overruling this defendant's Twenty-second Exception to said report of said Master in Chancery.

Twenty-third. In sustaining the report of said Master in Chancery fixing the value of the services on which the complainant is entitled to a return at $1,994,000, that such amount is based on the cost of reproduction and is excessive in that it capitalizes pavements and allows no depreciation, that complainant has claimed such services depreciate to the extent of 25 per cent., that the proper present valuation is the cost less depreciation, and such value
710 does not exceed $1,222,228.37, as shown on the books on December 31, 1905; and in overruling in this respect this defendant's Twenty-third Exception to said report of said Master in Chancery.

Twenty-fourth. In sustaining the report of said Master in Chancery finding that the amount on which the complainant is entitled to a return as against the consumer for meters and miscellaneous personal property is based on the reproduction value thereof at $4,100,000, adopting the estimate of Mr. Carter, and he carries such figures into the total.

whereas he should have found that such reproduction value was excessive; that such reproduction value is not a fair basis as between the complainant and the consumer in that it burdens the consumer with providing returns on an increase over the actual investment of the complainant, which increase is due to modern conditions, without allowing the consumer any benefits which reproduction by an ideal plant at the present time would give; that the only fair method between complainant and the consumer of determining the present value is to take the actual investment of complainant less depreciation, and such value should not exceed the figures of $3,261,687; and in overruling this defendant's Twenty-fourth Exception to said report of said Master in Chancery.

Twenty-fifth. In sustaining the report of said Master in Chancery including in the property on which the complainant is entitled to a return the present value of its franchises.

whereas he should have allowed only the actual investment therein or cost thereof; and in overruling this defendant's Thirty-ninth Exception to said report of said Master in Chancery.

Twenty-sixth. In sustaining the report of said Master in Chancery overruling and refusing to find the Fourteenth Amend-
711 ment and Request to Find made by the defendant the Attorney General of the State of New York and adopted by this defendant, as follows:

"*Fourteenth.* To the finding on page 39 of the draft report, that the present value of the mains to be $12,636,000, on the ground that the same were carried on the books of the company at the value of $7,852,151.03, as the actual cost thereof, and that the allowance of $4,783,849 for an estimated increase in the cost of laying the same to-day because of the change of pavements, over that which it actually cost the company, is not the proper allowance, representing no outlay of cash on the part of the company and representing the value of no property devoted by it to the public use."

whereas the same should have been allowed; and in overruling this defendant's Sixty-seventh Exception to the report of said Master in Chancery.

Twenty-seventh. In sustaining the report of said Master in Chancery overruling and refusing to find the Amendment and Request to Find made by the Attorney General of the State of New York and adopted by this defendant, as the first sub-head of the Twenty-ninth Amendment and Request to Find of said Attorney General of the State of New York, in each particular in which the same was so overruled or disallowed as follows:

"The said defendants hereby request the Master to find the further facts and embody them in his final report:

"I. That of the real estate of the constituent companies transferred to the complainant in 1884 the following parcels have either been sold or are not now used by the complainant in its gas business.

That the said parcels were valued in the appraisal made at
712 that time at the figures set opposite each parcel respectively:

1. Deeded to Standard Gas Light Company (Ex. p. 233 and Ex. 48):

8 lots, Avenue A, Sixty-second to Sixty-third streets, with corners	$68,000 00
115 feet on Sixty-third street, 4 3/5 lots, at $6,000	27,600 00
115 feet on Sixty-second street, 4 3/5 lots, at $5,000	23,000 00
	$118,600 00

2. Deeded to New Amsterdam Gas Company (Ex. 48, Ex. pp. 200, 201):

10 lots, Fifteenth street, between Avenues C and D, at $7,000	$70,000 00	
10 lots, Sixteenth street between Avenues C and D, at $6,000	60,000 00	
		$130,000 00

3. One Hundred and Eleventh Street Station (Ex., p. 318)	604,000 00
4. Bulkhead (Ex., p. 319)	100,000 00
5. Eighteenth Street Station (Test., p. 203)	1,823,000 00
6. East Twentieth to Twenty-second street, bulkhead taken by the City	250,000 00
7. Sixtieth to Sixty-first street, Avenue A, wooden buildings, rented (Test., p. 30, Ex. 232)	158,500 00
8. Shadyside (Test., p. 50., Ex. 235)	50,000 00
713	
9. South side Fifteenth street, between Avenues A and B, well property	12,000 00
10. Sixty-fifth street and West End avenue, west side vacant (Test., p. 107, Ex. p. 234)	115,000 00
	$3,361,100 00

which, deducted from the appraisal value of the real estate, $10,332,000 would leave the amount of real estate taken over and now in use of the appraised value in 1884 of $6,970,900. If the Master shall refuse to find that all of said parcels should be excluded, he find specifically as to each item from 1 to 10, above set forth."

Disallowed, excepting that it is the fact, and I so report, that (1) the several parcels numbered 1 to 10, inclusive, were appraised in 1884 at the figures respectively indicated, amounting in the aggregate to $3,361,100; (2) parcels 1 and 2 have been sold; (3) a portion of parcel 3, representing, according to the appraisal of 1884, a valuation of $84,000, has been taken in condemnation proceedings; (4) a portion of parcel 5 has been similarly taken, amounting, according to 1884 valuations, to $1,101,250, and (5) parcel 6 has been similarly taken. I decline to find that the remaining portion of parcel 3, or that parcels 4, 7, 9 and 10 are not now used by complainant in its gas business, for the evidence shows the contrary to be the fact, I similarly decline to find as regard the land remaining in parcel 5, excepting one block, valued at $400,000, which I have already excluded in my report (ante, p. 23).

Parcel 8 (Shadyside), has also already been excluded (ante p. 23).

whereas the same in said particulars should have been allowed; and in overruling this defendant's Sixty-ninth Exception to the said report of said Master in Chancery.

714 *Twenty-eighth.* In sustaining the report of said Master in Chancery overruling and refusing to find the Amendment and Request to Find made by the Attorney General of the State of New York and adopted by this defendant as the III. sub-head of the Twenty-ninth Amendment and Request to Find of said Attorney General of the State of New York as follows:

"That deducting from 'the amount of capital and assets of the complainant as of June, 1884, (as found by the Master at page 6 of the draft report), $27,649,060, would leave the cost to the com-

plainant of the assets now used by it to $21,845,850 as the proper cost price, in accordance with said findings of the Master."

whereas the same should have been allowed; and in overruling the Seventy-first Exception of this defendant to the said report of said Master in Chancery.

Twenty-ninth. In sustaining the report of said Master in Chancery overruling and refusing to find the Amendment and Request to Find made by the Attorney General of the State of New York and adopted by this defendant as the IV. sub-head of the Twenty-ninth Amendment and Request to Find of said Attorney General of the State of New York as follows:

"That the complainant has invested, in addition to real estate, plant and property, since the appraisal in 1884, to October 31st, 1905 (Ex. 79, p. 347*a*), $9,693,565.90, making the total cost of the real estate, plant and property used by the complainant in its gas business $31,539,415.90, to which should be added the value of material and supplies on hand, $616,470.08 (draft report 42), or a total of $32,155,885.98."

whereas the same should have been allowed; and in overruling the Seventy-second Exception of this defendant to the said report of said Master in Chancery.

715 *Thirtieth.* In sustaining the report of said Master in Chancery disallowing and refusing to find the Fifth Special Finding of Fact requested by the Attorney General of the State of New York, and adopted by this defendant as follows:

"That the properties of the constituent companies, so as aforesaid transferred to complainant as of the value of $29,994,000, cost the constituent companies new, without allowance for either appreciation or depreciation of its several classes of property, the sum of $20,942,632.85 as shown by the books of account of the several companies."

whereas the same should have been allowed, and in overruling this defendant's Seventy-fifth Exception to said report of said Master in Chancery.

Thirty-first. In sustaining the report of said Master in Chancery disallowing and refusing to find the Sixth Special Finding of Fact requested by the Attorney General of the State of New York and adopted by this defendant as follows:

"That the constituent companies, for the purposes of the consolidation aforesaid, by appraisers selected by them, appraised their land in excess of the then market value thereof and appraised their buildings, plant, mains, services and other tangible property at what it would then cost to produce the same new, as a part of a going concern; and that, if the Master should find the facts to be otherwise, he find and state the basis and method of such appraisal;"

whereas the same should have been allowed; and in overruling this defendant's Seventy-sixth Exception to said report of said Master in Chancery.

Thirty-second. In sustaining the report of said Master in Chan-

cery disallowing and refusing to find the twelfth special
716 finding of fact requested by the Attorney-General of the State of New York and adopted by this defendant as follows:

"That complainant's constituent companies paid for the real estate used by it in its gas business, including additions and improvements, to November 11, 1884, the sum of $3,317,791.10, and that complainant paid for the real estate purchased by it, including improvements and additions thereto, from November 11, 1884, to December 31, 1905, the sum of $740,296.28; that complainant's constituent companies wrote up the value of its real estate, prior to November 11, 1884, on account of appreciation, in the sum of $1,584,963.37, and that the complainant has written up the value of its real estate on account of appreciation since November 11, 1884, in the sum of $5,369,065.53, or a total of $6,954,028.90; that complainant has realized a profit of $142,378 on real estate sold by it since November 11, 1884; but that, if the Master find the fact to be otherwise, as to amount, that he find and report the cost value of complainant's real estate, as above, and the several amounts written up on account of appreciation in the value thereof, and the profits realized on sales thereof, during the periods stated."

whereas the same should have been allowed; and in overruling this defendant's Seventy-seventh Exception to said report of said Master in Chancery.

Thirty-third. In sustaining the report of said Master in Chancery disallowing and refusing to find the Thirteenth Special Finding of Fact requested by the Attorney-General of the State of New York and adopted by this defendant as follows:

"That the cost of the plant of the constituent companies new, transferred to complainant, did not exceed the sum of $6,133,-
717 690; that the same was appraised for the purposes of consolidation at the sum of $12,283,403.75, of which about $6,049,101.41 was pretended appreciation in the value thereof, arbitrarily written up; that the value of the plant of complainant on December 31, 1905, did not exceed the sum of $9,348,692; but, if the Master find the fact to be otherwise, that he find and report the cost of the plant transferred by the constituent companies to complainant in 1884, with the additions and improvements thereto; the value thereof as appraised for the purposes of consolidation, and the cost of the plant purchased by complainant from November 11, 1884, to December 31, 1905, with the additions and improvements thereto."

whereas the same should have been allowed; and in overruling this defendant's Seventy-eighth Exception to said report of said Master in Chancery.

Thirty-fourth. In sustaining the report of said Master in Chancery disallowing and refusing to find the Fourteenth Special Finding of Fact requested by the Attorney-General of the State of New York and adopted by this defendant as follows:

"That the mains and services of the constituent companies transferred to complainant in 1884, cost, new, not to exceed the sum of

$3,563,315.83; that they were transferred to the complainant at an appraisal valuation of $6,222,000; that, from November 11, 1884, to October 31, 1905, the complainant expended $2,618,188.93 for construction of new mains and $177,829.68 for construction of new services, or $2,796,008.61; that the value of complainant's mains, as shown by its books on December 31, 1905, was $7,498,526.15, and that the value of its services, as shown by its books on said date, was $1,222,228.37, which includes the appraisal value afore-
718 said; that complainant reported the value of its mains and services, upon the basis of reproduction new, to the State Board of Tax Commissioners, as of date June 30, 1905, to be $5,801,463.10; that the difference between the cost value of complainant's mains and services and the value thereof as returned in the appraisals of the experts employed to inventory the value of the same in 1906, was upon the basis of the increased cost to install the same under conditions at present existing, under pavement that has been laid since their original installation, etc., and the difference between the expense of the cost of labor and materials in laying them at the present time, as compared with the cost thereof at the time of their installation."

whereas the same should have been allowed; and in overruling this defendant's seventy-ninth exception to said report of said Master in Chancery.

Thirty-fifth. In sustaining the report of the Master in Chancery disallowing and refusing to make in part the special request to find an amendment proposed by the Attorney-General of the State of New York and adopted by this defendant numbered as sub-head VI. of the Twenty-ninth special request to find as follows:

"That a similar plant with a daily capacity of 10,000,000 cubic feet could be constructed at a cost of $2,441,014.51 (test of William H. Bradley, pp. 1966-1978), exclusive of real estate and holder or a unit of $244.00 per thousand of capacity. On this basis a modern first-class coal-gas plant of 9,500,000 cubic feet daily capacity could be produced for $2,318,000,"

whereas the same should have been allowed; and in overruling in this respect the Seventy-third Exception of this defendant to the said report of the said Master in Chancery.

719 *Thirty-sixth.* In sustaining the report of the Master in Chancery finding that the present values of the properties of the complainant used by it in the production and distribution of gas and upon which it is entitled to earn a return as fixed in paragraph II. of said decree are sustained by the weight of competent evidence, whereas he should have found that such values were not sustained by the weight of the competent evidence in the case; said findings being erroneous in each of the particulars enumerated as Assignments of Errors Nos. Thirty-eighth to Forty-fourth inclusive, hereinafter set forth, each of which is separately alleged as a ground of error in this respect.

Thirty-seventh. In sustaining the report of the Master in Chancery finding that the present values of the properties of the complain-

ant used by it in the production and distribution of gas and upon which it is entitled to earn a return as fixed and adjudged in paragraph II. of said decree, are sustained by the weight of competent evidence in the case, whereas he should have found that the burden was on the complainant to establish such values and that it had failed to do so by any competent evidence whatsoever, said finding being erroneous in each particular enumerated in Assignment of Errors Nos. *a*Thirty-eighth to Forty-fourth inclusive, hereinafter set forth, each of which is separately alleged as a ground of error in this respect.

Thirty-eighth. In sustaining the report of the Master in Chancery finding that the valuation of the real estate used by the complainant in the production and manufacture of gas upon which it is entitled to earn a return as claimed by it was sustained by the weight of competent evidence, whereas he should have found to the contrary, and in overruling in this respect the Third Exception of this defendant to the said report of the said Master in Chancery.

720 *Thirty-ninth.* In sustaining the report of the Master in Chancery finding that the values of the plant of the complainant used by it in the production and distribution of gas upon which it was entitled to earn a return claimed by it, is sustained by the weight of competent evidence, whereas he should have found to the contrary, and in overruling in this respect the Fourteenth Exception of this defendant to said report of the said Master in Chancery.

Fortieth. In sustaining the report of the Master in Chancery finding that the values of the plant of the complainant used by it in the production and distribution of gas upon which it was entitled to earn a return claimed by it, is sustained by the weight of competent evidence, whereas he should have found to the contrary, and in overruling in this respect the Sixteenth Exception of this defendant to said report of the said Master in Chancery.

Forty-first. In sustaining the report of the Master in Chancery finding that the values of the mains of the complainant used by it in the production and distribution of gas upon which it was entitled to earn a return claimed by it, is sustained by the weight of competent evidence, whereas he should have found to the contrary, and in overruling in this respect the Nineteenth Exception of this defendant to said report of the said Master in Chancery.

Forty-second. In sustaining the report of the Master in Chancery as modified by said decree finding that the value of the franchises claimed by the complainant and adjudged and decreed to be included in the properties upon which it is entitled to earn a return, is sustained by the weight of competent evidence, whereas said Master should have found and said Court should have decreed that there was no evidence in the record either as to the original cost or the present value of said franchises and in overruling in this re-

721 spect the Thirty-eighth Exception of this defendant to the said report of said Master in Chancery.

Forty-third. In sustaining the report of the Master in Chancery failing to give proper weight or binding effect to the complainant's tax reports offered in evidence in this case, and in overruling in this respect this defendant's Forty-third Exception to the said report of the said Master in Chancery.

Forty-fourth. In sustaining the report of said Master in Chancery overruling and refusing to make the twelfth amendment proposed by the Attorney-General of the State of New York and adopted by this defendant as follows:

"To the finding of the value of the manufacturing plant of the complainant to be $15,500,000 on the ground that the complainant has failed to give any correct and true value of the plant used by it, and that the Master should have found a failure of proof on the part of the complainant in this behalf"

whereas he should have allowed the same, and in overruling in this respect this defendant's Sixty-sixth Exception to the said report of the said Master in Chancery.

Forty-fifth. In adjudging and decreeing in paragraph II. of said decree that the present value of the real estate of complainant actually employed by it in its business of manufacturing and supplying gas is $11,985,435 and in sustaining as thereby modified and as modified by subhead (*a*) of the first paragraph of said decree the report of said Master in Chancery, said finding and decree being erroneous in each of the particulars enumerated in assignment of errors Nos. Forty-sixth to Forty-eighth inclusive, hereinafter set forth, each of which is separately alleged as a ground of error in this respect.

Forty-sixth. In including in the real estate of the com-
722 plainant as used by it in the production and distribution of gas and upon which it is entitled to earn a return certain tracts of real estate not shown by the evidence to be owned by it, and in sustaining in this respect the report of said Master in Chancery and overruling this defendant's Tenth Exception to the report of the said Master in Chancery.

Forty-seventh. In including in the real estate of the complainant as used by it in the production and distribution of gas and upon which it is entitled to earn a return of certain tracts of real estate not shown by the evidence to be owned by it, and in sustaining in this respect the report of said Master in Chancery and in overruling this defendant's Eleventh Exception to the report of the said Master in Chancery.

Forty-eighth. In sustaining the report of the Master in Chancery valuing the real estate of the complainant claimed to be used by it in the production and distribution of gas upon which it is entitled to earn a return as vacant land, whereas he should have deducted the cost and expense of tearing down and removing such buildings as were located thereon which would be unavailable for an ordinary purchaser, and in overruling in this respect the third sub-head of this defendant's Third Exception to the said report of the said Master in Chancery.

Forty-ninth. In adjudging and decreeing in paragraph II. of said decree that the valuation of the complainant's plant used by it in its business of manufacturing and supplying gas is $15,500,000, and in sustaining in this respect the report of the said Master in Chancery and in overruling the Sixteenth Exception of this defendant to said report of the said Master in Chancery; each of the grounds alleged in the said exception being separately assigned as a ground of error in this respect and in sustaining the report of the said Master dis-

allowing and refusing to find the amendment and request to find
made by the Attorney-General of the State of New York and
723 adopted by this defendant, numbered I. and II., whereas the
same should have been allowed, and in overruling in this respect this defendant's Seventieth Exception to the said report of the said Master in Chancery.

Fiftieth. In adjudging and decreeing in paragraph II. of said decree that the valuation of the complainant's plant used by it in its business of manufacturing and supplying gas is $15,500,000, and in sustaining in this respect the report of the said Master in Chancery in overruling the Seventeenth Exception of this defendant to said report of the said Master in Chancery, each of the grounds alleged in the said exception being separately assigned as a ground of error in this respect and in sustaining the report of the said Master disallowing and refusing to find the amendment and request to find made by the Attorney General of the State of New York, and adopted by this defendant, numbered I. and II., whereas the same should have been allowed and in overruling in this respect this defendant's Seventieth Exception to the said report of the said Master in Chancery.

Fifty-first. In adjudging and decreeing in paragraph II. of said decree that the value of the mains employed by the complainant in its business of manufacturing and distributing gas is $12,636,000, and in sustaining in this respect the report of the Master in Chancery, and in overruling in this respect the Nineteenth Exception of this defendant to the said report of the said Master in Chancery; each of the grounds set forth in said exception being separately alleged as a ground of error in this respect.

Fifty-second. In sustaining the report of the said Master in Chancery in refusing to find that owing to the consolidation of the six constitutent companies in 1884, forming the complainant, there exists to-day under one system considerable duplication of the
724 mains in the City streets which would not have existed had not these companies attempted to consolidate, and that the consumer should not be required to provide a return on the value of this duplication, whereas he should have so found, and in overruling in this respect this defendant's Twenty-first Exception to the said report of the said Master in Chancery.

Fifty-third. In adjudging and decreeing in paragraph II. of said report that the value of the services employed by the complainant in its business to manufacture and supply gas is $1,994,000, and in sustaining in this respect the report of the said Master in Chancery and in overruling this defendant's Twenty-third Exception to the said report of the said Master in Chancery, each of the grounds in the said exception being separately alleged as a ground of error in this respect.

Fifty-fourth. In adjudging and decreeing in paragraph II. of said decree that the value of the meters and miscellaneous personal property employed by the complainant in its business of manufacturing and distributing gas is $4,100,000, and in sustaining in this respect the report of the said Master in Chancery and in overruling this defendant's Twenty-fourth Exception to the said report of the said

Master in Chancery, each of the grounds stated in the said exception being separately alleged as grounds of error in this respect.

Fifty-fifth. In alleging and decreeing in paragraph II. of said decree that the complainant was the owner of certain special franchises used by it in its business of manufacturing and distributing gas and in sustaining in this respect the report of the said Master in Chancery, said finding and decree being erroneous in each of the respects enumerated in assignment of errors Nos. Fifty-sixth to Sixty-first, inclusive, hereinafter set forth, each of which is separately alleged as a ground of error in this respect.

725 *Fifty-sixth.* In sustaining the report of the said Master in Chancery finding that the Statute of 1884 under which the complainant was organized, cured defects in the franchise of the Harlem Gas Light Company, whereas he should have found that said Act did not authorize nor apply to the consolidation effected by the complainant or in any manner revive or validate any of the franchises of the six constituent companies.

Fifty-seventh. In sustaining the report of the said Master in Chancery finding that complainant was the owner by virtue of the consolidation whereby it was created, of the franchises to carry on a gas business in The City of New York, and to use the streets, avenues and public places thereof for that purpose claimed by the Knickerbocker Company by and under chapter 944 of the Laws of 1871, and that the objections to the Knickerbocker Gas Light Company franchise under chapter 944 of the Laws of 1871, and by assignment from the Anthracite Company, are technical, and many of them could obviously be cured.

whereas said Master should have found that the said Knickerbocker Company never owned or had the legal title to the franchises, if any, conferred thereby, and that complainant never held or owned and has never been entitled to and is not now entitled to use the same, and that such assignments not having been recorded and not having seen the light of day since their execution until this action was brought, that all objections and irregularities noted, or the great majority of them, were important or material, and at least until such defects were cured or explained the records relied on had no probative force whatever; and in overruling in this respect this defendant's Thirty-fourth Exception to the said report of the said Master in Chancery.

Fifty-eighth. In sustaining the report of the said Master in Chancery finding that the said complainant owned by virtue of
726 the consolidation whereby it was created, the franchises to carry on the gas business in The City of New York and to use the streets, avenues and public places thereof for that purpose, granted to the Harlem Gas Light Company and that the same was an assignable franchise in perpetuity at the time of the enactment of the statutes and the making of the order complained of, and property of the complainant devoted by it to public use.

whereas, he should have found that the said franchise granted to the Harlem Gas Light Company ceased and expired on May 26th, 1905,

and was not at the dates aforesaid property devoted by the complainant to public use; and in overruling in this respect this defendant's Thirty-fifth Exception to the said report of the said Master in Chancery.

Fifty-ninth. In sustaining the report of the said Master in Chancery finding that under the charter of the City of New York the municipal authorities have been permitted to grant franchises only on conditions requiring a substantial return to the City.

whereas said finding is not justified as there is no evidence in the record to support the same; and in overruling in this respect this defendant's Thirty-sixth Exception to said report of the said Master in Chancery.

Sixtieth. In sustaining the report of the said Master in Chancery finding "In short, so far as the present record shows, the municipal authorities have fully acquiesced in the continued use and occupation of the streets by complainant.

"These considerations would appear to be sufficient for the purposes of the present case, and render unnecessary a discussion of the elaborate arguments submitted by counsel."

whereas said Master should have found that the complainant cannot and has not gained any franchise by any omission of the
727 City or by adverse possession, nor is the City estopped by any acquiescence on its part in the unlawful use of the streets. That the defendant The City of New York, though the largest single consumer of the complainant, does not represent all the consumers, and that the remainder of such consumers should not be prejudiced by any acquiescence or omission of the City; and in overruling in this respect this defendant's Thirty-seventh Exception to the said report of the said Master in Chancery.

Sixty-first. In sustaining said report of the said Master in Chancery in refusing to find a consolidation of the constituent companies was not authorized under chapter 367 of the Laws of 1884, and was against public policy, as such act could not be construed to cover gas companies and that said complainant did not thereby acquire any title to any franchises of said constituent companies, whereas he should have so found; and in overruling in this respect this defendant's Second Exception to the said report of said Master in Chancery.

Sixty-second. In adjudging and decreeing in paragraph II. of said decree that the special franchises claimed by the complainant and held to belong to it were property employed by it in its business of manufacturing and distributing gas on the value of which it was entitled to earn a return, and in sustaining in this respect the report of the said Master in Chancery.

whereas he should have found that even if such franchises were valid and existing, they did not constitute property properly included among the assets upon which complainant is entitled to a return. That there is no evidence in the record showing the original cost of

such franchises to the complainant, and that in the absence of any evidence of the sum originally invested therein, whatever value such franchises may have at the present time, is entirely a resultant
728 value depending on the possibilities of the business which the franchise covers. That the greater profits the complainant can make in such business the greater becomes the value of the franchise. That as the value of the franchise depends upon the profits and therefore upon the rate, any change in the rate affecting the profits must affect the value of the franchise, and therefore to include the present value of the franchise in the assets on which a return is to be allowed in fixing a rate, is to reason in a circle and to enable the complainant to lift itself by its boot straps, *i. e.*, the higher the rate the higher the value of the franchise, and as the complainant claims, the higher the value of the franchise the greater must be the rate to allow a return thereon. That in time, under such conditions, with only the normal increase in business augmenting the value of the franchise, any rate would become confiscatory and rate regulation impossible; and in overruling in this respect the Thirty-eighth Exception of this defendant to the said report of the said Master in Chancery.

Sixty-third. In adjudging and decreeing in paragraph II. of said decree that the value of the franchises of the complainant employed by it in the manufacture and distribution of gas was the sum of $12,000,000, said decree being in this respect erroneous for each of the causes and reasons set forth in assignment of errors Nos. Sixty-fourth to Sixty-ninth, hereinafter set forth.

Sixty-fourth. In adjudging and decreeing in paragraph II. of said decree that the value of the special franchises of the complainant employed in its business of manufacturing and distributing gas is the sum of $12,000,000, and in the sustaining as modified by subhead E of paragraph I. of said decree and by said paragraph II. of said decree, the report of the Master in this respect and in overruling the Fortieth Exception of this defendant to said report of said Master in Chancery.

Sixty-fifth. In holding and finding that the value of $7,781,000, held to be the value of said franchises in the year 1884, had
729 increased to the sum of $12,000,000 at the time of the commencement of this suit, said increase being based upon a proportion of the claimed increase in the value of the tangible properties of the complainant.

Sixty-sixth. In holding and finding that the value of the franchises of the complainant in the year 1884 was $7,781,000, whereas the Court should have found that there was included in that value certain patents, contracts and other rights of at least a value of $2,500,000, and in failing to proportionately decrease the present value assigned to such franchise-, the said patents, contracts and other rights having expired.

Sixty-seventh. In holding and finding that the value of the franchises of the complainant in the year 1884 was $7,781,000, whereas the Court should have found that there was included in the franchises claimed to be owned by said complainant at that time and acquired by it through its constituent companies also the franchises of the

New York Gas Light Company, the Manhattan Gas Light Company, the Metropolitan Gas Light Company and the Municipal Gas Light Company and the value of $7,781,000 fixed at that time by said complainant as the value of the franchises and other rights of said constituent companies and taken by the Court as the basis of value in 1884, for the franchises of said complainant included the value of the franchises of the said four constituent companies last named, and the Court should have made a proportionate reduction for the value of the franchises of the said four companies, it having failed as stated in paragraph II. of said decree to pass in any way upon the question whether said complainant owned said franchises, or upon the validity of such franchises, and having based its finding of $12,000,000 as the value of the franchises held to be owned and used by said complainant solely upon an alleged increase of the
730 said sum of $7,781,000 so fixed by the complainant in the year 1884 in proportion to the increase of the tangible properties of said complainant.

Sixty-eighth. In adjudging and decreeing in paragraphs I. and II. of said decree that the value of the franchises owned and used by said complainant in the manufacture and distribution of gas upon which it is entitled to earn a return is $12,000,000 without any evidence in the record whatsoever as to the specific value at the time of the commencement of this action or at any other time of the franchises derived, or claimed to be derived by said complainant from the Knickerbocker Gas Light Company including the Anthracite Gas Lighting and Heating Company and the so-called State Grant, the Harlem Gas Light Company, under which franchises alone the Court finds in paragraph I. of said decree said company is operated, the said figure of $12,000,000 being arrived at by the Court on the mere assumption of an increase in the value of franchises proportionate to that of tangible property and from a calculation based upon an erroneous original valuation, said original valuation having concededly included items as pointed out in the two preceding assignments of error in addition to the franchises which the Court alone finds the company is operating under.

Sixty-ninth. In failing to make an express finding as to the present existence of the franchises claimed by complainant and derived from the following corporations, respectively, such failure in the case of each of such companies being separately assigned for error, whereas the Court should have found that as to each of said franchises the company is no more than a holdover occupant whose right of occupancy is terminable at the will of the State of New York or The City of New York, namely:

1. The New York Gas Light Company;
2. The Manhattan Gas Light Company;
731 3. The Municipal Gas Light Company;
4. The Metropolitan Gas Light Company:

said municipal franchise being at all times invalid on account of lack of authority of the Mayor, Comptroller and Commissioner of Public Works to grant it, and in failing to pass upon this defendant's Thirty-third Exception to said Report of said Master in Chancery.

Seventieth. In adjudging and decreeing in sub-head (*h*) of paragraph I. of said decree that the operating expenses of the complainant in the production and distribution of the gas manufactured by itself was the sum of $6,809,552.28 and in the cost of gas purchased the sum of $997,039.80 and in sustaining the Report of the Master in Chancery in this respect except as modified by sub-heads (*f*) and (*g*) of paragraph I. of said decree and in overruling in this respect the Forty-fourth Exception of this defendant to the said Report of the said Master in Chancery, said decree in this respect being also erroneous for each of the causes and reasons specified in assignments of error enumerated Seventy-first to Ninety-fifth inclusive, hereinafter set forth, each of which is assigned as a separate ground of error in this respect.

Seventy-first. In adjudging and decreeing in sub-head (*g*) of paragraph I. of said decree that there should be an allowance of 11 cents for a thousand cubic feet in the actual production of its own works to cover repairs, renewals and depreciation, immediate and ultimate, as part of the actual operating expenses of said complainant and in sustaining as modified in said sub-head (*g*), paragraph I., of said degree, Report of said Master in Chancery in this respect, and in overruling in this respect and to this extent the Forty-fifth and Fifty-third Exceptions of this defendant to said Report of the said Master in Chancery.

Seventy-second. In sustaining the Report of said Master
732 in Chancery allowing complainant to include in the cost of its gas the sum of $289,259.09 for street lamps, whereas the Master should have found that such item forms no proper part of the cost of complainant's gas and should be excluded therefrom, and in overruling this defendant's Forty-sixth Exception to the Report of the said Master in Chancery.

Seventy-third. In sustaining the report of the said Master in Chancery allowing the complainant to include in the cost of its gas the sum of $42,674.71 for real estate rents, whereas he should have found that there was no evidence tending to show that the property so leased was necessarily used in the business of manufacturing and distributing gas and that such items form no proper part of, and should not be included in, the cost of gas, and in overruling this defendant's Forty-eighth Exception to the report of said Master in Chancery.

Seventy-fourth: In sustaining the report of the said Master in Chancery, including in the cost of complainant's gas the sum of $62,034.61 for taxes on stock, whereas he should have found that such amount did not represent expenses likely to recur in future periods, and to include them in the cost of gas for the purposes of this suit would be prejudicial to consumers in the future, and that the same forms no proper part of the cost of gas and should be excluded therefrom, and in overruling in this respect the Forty-ninth Exception of this defendant to said report of the said Master in Chancery.

Seventy-fifth. In sustaining the report of the said Master in Chancery, including in the cost of gas taxes on special franchises to the

amount of $406,909.23, whereas such amount has not yet been paid, is being litigated and may never be paid, is based on the value predicated on the rate of one dollar per thousand feet of gas, that such tax was intended to reach the surplus earning capacity of the business after a fair return was provided on the tangible investment and therefore to burden the stockholders and not the
733 consumers. That a fixed rate is not required to produce a surplus net earning that is not confiscatory, and not producing such surplus net earnings, no taxable basis would be provided, and in overruling in this respect the Fiftieth Exception of this defendant to the report of the said Master in Chancery.

Seventy-sixth. In sustaining the report of the said Master in Chancery failing to deduct from the cost of gas the amount of taxes on real estate which defendants claim is not owned by the complainant but which is included in paragraph II. of said decree among the properties covered by the valuation fixed for the property there used by the complainant in the production and distribution of gas, whereas such amount should be deducted from the cost of gas in the same manner as the value of such real estate should be deducted from investments, and in overruling in this respect the Fifty-first Exception of this defendant to the said report of the said Master in Chancery.

Seventy-seventh. In sustaining the report of the Master in Chancery overruling and disallowing this defendant's amendment and correction to the Master's report No. Sixteen, asking for a correction in the cost of gas by deducting the sum of 3.6 cents from the apparent cost of gas per thousand cubic feet as found by the Master, whereas the said Master should have allowed said correction, and in overruling in this respect the Fifty-second Exception of this defendant to the said report of the said Master in Chancery.

Seventy-eighth. In sustaining the report of the said Master in Chancery overruling and refusing to allow the request for a reduction in the cost of gas to complainant made by this defendant under the heading of "Suggested Economies," and allowing and finding complainant's amendment and request XII. as follows, "nor is there any satisfactory evidence that any of the expenditures of the
734 complainant for material, labor or otherwise in the manufacture and distribution of gas had been improper, unnecessary or unreasonable," whereas he should have found as follows:

Oil. That the cost of gas to complainant is increased unnecessarily by injudicious use and purchase of oil; that it is unnecessary for the complainant to make one contract for all its oil, where it claims that there is only one company which can supply the total amount required that separate contracts could be made for the separate stations in the same manner as with the Mutual Gas Light Company; that the complainant abandoned in 1905 a contract more advantageous that the one subsequently entered into; and by the proper use of modern machinery complainant would not be restricted to homogeneous oils; that the prices paid by complainant are excessive and above the rates paid by other companies.

Coke and Other Residuals. The residuals from the manufacture

of gas are handled by middlemen with poor results to the company That the yield of salable coke is insufficient, that the coke sales of the company are stated by the Master to have averaged $4.71 per short ton (2,000 pounds) to the "inside" company handling the coke, while but $2.35, or one-half is realized by the gas company. Although the stock of the company which handles the coke is owned by the Consolidated Gas Company, the returns to the gas company amount to but four one-hundredths (.04) cents per 1,000 cubic feet of gas sold. That the other residuals are not handled to the best advantage. Coal tar is handled by an outside corporation on still better terms to itself. When the market price of tar products is 7 cents per gallon, the gas company's share by contract is a trifle over 2 cents.

Ammonia liquor is treated on somewhat similar lines; the complainant receiving for its share about one-half the market price.

That the other residuals are not handled to the best advan-
735 tage, and that all the residuals which the present state of the art returns, are not made use of.

Candle Power. That the average candle power maintained was unnecessarily in excess of the legal requirements.

Real Estate. That the complainant holds, claims a return and pays taxes on considerable real estate in excess of the amount actually or necessarily in use in its business.

That by all of the above the cost of gas to the complainant is increased; that by proper management the cost to complainant could be reduced and such wasteful methods should not be permitted to increase the cost as against the consumer.

And in overruling in this respect the Fifty-fourth Exception of this defendant to the said report of the said Master in Chancery, each item and detail of said "Suggested Economies" and findings being alleged separately as the specific ground of error in this respect.

Seventy-ninth. In sustaining the report of the said Master in Chancery finding that an examination of the figures as to the cost of gas of other companies does not sustain the contention that the complainant's operating cost is excessive; whereas he should have found that such figures show that the cost to the complainant is excessive and that the complainant finds it is cheaper to buy gas than to manufacture it and buys considerable of its output from other companies that its plants are not so advantageously arranged or employed to produce gas as cheaply as such other companies and that it is not justified in charging the consumer with such excess cost; and in overruling this defendant's Fifty-fifth Exception to said report of the said Master in Chancery.

736 *Eightieth.* In sustaining the report of the said Master in Chancery allowing complainant's Amendment VII., as follows:

"That the propriety of an allowance sufficient to bring the amount expended for current repairs and renewals for any one year up to the average covering a period of years, is fully established by the evidence."

whereas, he should have found that such addition should not have

been allowed without allowing the average of other items entering into the cost, concerning which, for years other than 1905, defendants were denied access to the books of complainant; and further that the repairs for past years are no criterion for the present, owing to the improvements in the manufacture of gas during the past thirty years; and in overruling this defendant's Sixtieth Exception to the report of the said Master in Chancery.

Eighty-first. In sustaining the report of the Master in Chancery allowing complainant's Amendment VI. where he should not have allowed the same but have found that such amendment ignores the progress made in the last thirty years in the manufacture of gas and in overruling this defendant's Sixty-third Exception to the report of the said Master in Chancery.

Eighty-second. In sustaining the report of the Master in Chancery allowing complainant's Amendment VIII., so far as regards items not included in 65.84 cents per thousand feet for gas found by the said Master; whereas he should not have allowed the same but should have found that the figures of 65.84 cents including as it does an unexpended amount of $1,328,000 of surplus earnings more than covers all assumed and problematical expenses injected into the business of gas manufacture and distribution and not warranted by complainant's past practice nor by any correct method of book-
737 keeping and in overruling this defendant's Sixty-fourth Exception to the said Master's report.

Eighty-third. In sustaining the report of the said Master in Chancery allowing complainant's Amendment IX., that oil is cheaper in Chicago than in New York, whereas he should have found that the complainants have raised the price of oil in New York by a specification in regard to its quality and therefore there is no basis for comparison with New York nor is the kind or degree of oil used in Chicago specified, and in overruling this defendant's Sixty-fifth Exception to the said report of the said Master in Chancery.

Eighty-fourth. In sustaining the report of the said Master in Chancery overruling and refusing to make the amendment and request to find of the Attorney-General of the State of New York adopted by this defendant's Numbered Twenty-fifth; whereas the same should have been allowed, and in overruling in this respect this defendant's Sixty-eighth Exception to said report of the said Master in Chancery.

Eighty-fifth. In sustaining the report of the said Master in Chancery disallowing in part and refusing to find the Thirty-third Special Finding, requested by the Attorney-General of the State of New York and adopted by this defendant; whereas the same should have been allowed and made, and in overruling in this respect this defendant's Eightieth Exception to the report of the Master in Chancery.

Eighty-sixth. In sustaining the report of the said Master in Chancery disallowing in part and refusing to find the Thirty-fourth Special Finding, requested by the Attorney-General of the State of New York and adopted by this defendant; whereas the same should

have been allowed and made, and in overruling in this respect this defendant's Eighty-first Exception to the report of the said Master in Chancery.

738 *Eighty-seventh.* In sustaining the report of the said Master in Chancery disallowing in part and refusing to find the Thirty-fifth Special Finding, requested by the Attorney-General of the State of New York, and adopted by this defendant; whereas the same should have been allowed and made, and in overruling in this respect this defendant's Eighty-second Exception to the report of the said Master in Chancery.

Eighty-eighth. In sustaining the report of the said Master in Chancery disallowing in part and refusing to find the Thirty-sixth Special Finding, requested by the Attorney-General of the State of New York, and adopted by this defendant; whereas the same should have been allowed and made, and in overruling in this report this defendant's Eighty-third Exception.

Eighty-ninth. In sustaining the report of the said Master in Chancery disallowing in part and refusing to find the Thirty-seventh Special Finding, requested by the Attorney-General of the State of New York, and adopted by this defendant; whereas the same should have been allowed and made, and in overruling in this respect this defendant's Eighty-fifth Exception.

Ninetieth. In sustaining the report of the said Master in Chancery disallowing and refusing to find this defendant's Eleventh Amendment, as requested to find, whereas the same should have been allowed, and in overruling this defendant's Eighty-eighth Exception to the report of the said Master in Chancery.

Ninety-first. In finding and decreeing in sub-head (*h*) of paragraph I. of said decree that the sum of $1,865,717.43 represents more than a normal profit upon the cost of purchased gas, in that the amount paid by complainant to other companies for the same ($997,039.80) was paid under temporary and expiring agreements and did not include any reasonable recompense of the return upon the value of investment required to produce said gas, said finding and

739 decree being erroneous in the particulars enumerated in the Assignments of Errors Nos. Ninety-second to Ninety-fifth inclusive, hereinafter set forth, each of which is alleged as a separate ground of error in this respect.

Ninety-second. In finding and holding that the probable cost of gas assumed by the Court as required and furnished by other companies would be 32 cents per thousand at the holder, instead of about 28 cents.

Ninety-third. In finding and holding that in determining the probable profit on the gas assumed by the Court as required and furnished by other companies 6 per cent. interest, amounting to $720,000, should be allowed in addition to the 32 cents per thousand referred to in the Ninety-second Assignment of Error.

Ninety-fourth. In finding and holding that the probable profit on the four billion cubic feet, which the Court assumed would be required and furnished by other companies in the near future would be no greater than the profit on the three billion cubic feet of gas

made and furnished by other companies and purchased by complainant under existing agreements at the present time.

Ninety-fifth. In fixing and determining said probable profit from purchased gas at the sum of $1,865,717.43 upon the basis of a capitalization of $12,000,000, whereas he should have found that a company with a capitalization of less than $4,000,000 would be able to furnish the four billion feet of gas so assumed and estimated upon by the Court in reaching that figure.

Ninety-sixth. In sustaining the report of the said Master in Chancery that the maximum daily output of the complainant during the year 1905 is about 70,000,000 cubic feet, and overruling in this respect this defendant's Twenty-ninth Exception to the report of the said Master in Chancery.

740 *Ninety-seventh.* In sustaining the report of the said Master in Chancery that the maximum daily capacity of the complainant's plants was but 51,000,000 cubic feet.

whereas he should have found such maximum daily capacity was at least 58,500,000 cubic feet as appears from the calculations based on complainant's exhibits, and overruling in this respect this defendant's Thirtieth Exception to the report of the said Master in Chancery.

Ninety-eighth. In sustaining the report of the said Master in Chancery that the 20 per cent. reserve of the complainant's manufacturing capacity is necessary in a large city like New York, and that the complainant to cover such reserve was justified in buying gas from other companies.

whereas he should have found that ample reserve capacity existed in the complainant's works at the present time as shown from their own exhibits unless complainant's plants must be admitted to be in a greatly depreciated state and incapable of approaching their maximum output; and in overruling this defendant's Thirty-first Exception to the report of the said Master in Chancery.

Ninety-ninth. In sustaining the Master's report allowing complainant's amendment IV., whereas he should not have allowed the same, but have found that such figure omits several important items, the most important being surplus fund of $1,328,000 and therefore was not the net earnings from the gas estimated; and in overruling this defendant's Sixty-second Exception to the report of the said Master in Chancery.

One-hundredth. In sustaining the said Master's report holding that the complainant was entitled to and allowing it a return on the present value of its real estate, whereas he should have found that where the taxes for such real estate are included in the cost

741 of gas in estimating the net returns from complainant's business and the complainant on the sale of such real estate will concededly be able to realize a considerable surplus above the original investment therein, and that said surplus represents an ample and sufficient return thereon inasmuch as it is customary in localities where such increases in real estate values occur for investors to hold real estate without return other than sufficient to pay taxes relying

merely on the profit to be made from such advances in value at the time of sale, and therefore complainant is not entitled to a return against the consumer on any real estate investment over and above the amounts charged for fixed charges in estimating complainant's net return and in overruling this defendant's Seventh Exception to the said report of the said Master in Chancery.

One hundred and first. In adjudging and decreeing in sub-head (*h*), paragraph I. of said decree that owing to a probable increase in the sales of gas and in the cost of gas obtained from other companies, and probable change in the source of manufacture of some portion of gas, while the total net increase for the year beginning May 1st, 1906, would remain the same on the basis aforesaid, yet if the price of gas were reduced as provided in chapter 736 of the Laws of 1905, and chapter 125 of the Laws of 1906, both of the State of New York, the net income of complainant for said year beginning May 1st, 1906, would be reduced to the sum of $3,024,592.45.

One hundred and second. In sustaining the report of the said Master in Chancery refusing to find on the request of the Attorney General of the State of New York, and of this defendant that a reduction in the price of gas leads to a proportionate increase in the *per capita* of consumption in The City of New York of about 46.46 cents for each one cent of reduction, and that on such basis the estimated sales of complainant in 1907 would be about fifteen billion three hundred million (15,300,000,000) cubic feet; whereas he should have so found and have further found that such an
742 increase should be considered by determining the net earnings from the reduced rate and not by the method of deducting 20 cents per thousand on the output for the year 1905 on the basis of the old rate, as was done by the said Master in his report and by the Court in its decree referred to in the One Hundred and First Assignment of Error and in overruling in this respect this defendant's Fifty-ninth Exception to the said Master's report.

One hundred and third. In adjusting and decreeing in paragraph III. of said decree that the lowest rate of return which can be considered legislatively fair, just or reasonable, upon the value of the property employed by complainant in the business of manufacturing and supplying gas, is six per cent., at which conclusion the Court has arrived in part by taking judicial notice of local conditions in The City of New York; and under the two acts and the order, copies of which are annexed to the bill of complainant as Exhibits A, D and C, to wit, chapter 736 of the Laws of 1905 of the State of New York, chapter 125 of the Laws of 1906 of said State, and the order of the Commission of Gas and Electricity of the State of New York, made on the 23d day of February, 1906, and directed to the complainant, the net annual income which the complainant can earn upon the property employed in its gas business as aforesaid is less than six per cent.

One hundred and fourth. In sustaining the report of the said Master as modified by paragraphs I. and II. of said decree, finding that the rate of 80 cents per thousand cubic feet of gas sold by complainant would not constitute a fair and reasonable return on the

value of the property, and on pages 141 and 151, complainant's Amendments XIII., that such a fair and reasonable rate is not less than six per cent.

whereas he should have found that the rates as modified were fair and reasonable; that the records show that both the public and the complainant are content with similar investments bringing
743 no greater return; that complainant is not entitled to a six per cent. return; and in overruling this defendant's Fifty-sixth Exception to the Report of the said Master in Chancery.

One hundred and fifth. In sustaining the report of said Master in Chancery finding that the 80 cent rate does not allow the complainant a reasonable return upon the fair value of the property actually and necessarily used in the business of making and distributing gas. whereas he should have found that with net earnings of $6,807,455.15, based on a cost of 52.50c. (see Forty-Fourth Exception), after deducting 20c. per thousand on 13,283,000,000 feet of sales, or $2,656,600, would leave a balance of $4,150,855.15, which would provide a return of 4.97 per cent. on a valuation of $83,357,000 and a return of 6.55 per cent. on a valuation of $63,357,000 and a still higher return on a valuation based on a fair present valuation of the property; that none of such rates are unfair or unreasonable, and in overruling this defendant's Fifty-seventh Exception to the said report of the said Master in Chancery.

One hundred and sixth. In adjudging and decreeing that the pressure required by said two acts and the order aforesaid is not physically impossible if the entire system of gas distribution in The City of New York be reconstructed; but compliance with such requirement is commercially impossible under the rates for gas prescribed by said acts and order.

One hundred and seventh. In sustaining the report of the said Master in Chancery that modern appliances such "as Welsbach burners, gas logs and gas ranges require a much higher pressure for service to consumers than was the case some years ago," and has also found (pp. 143 and 151-152, complainant's amendment) that the method suggested for overcoming at moderate cost the deficiency of complainant's mains, is subject to "some doubt suggested by the evidence as to the feasibility of the system," and "it appeared that the cost of the new construction necessary to carry out the
744 plan as described would be in the neighborhood of $4,000,000 for main and valve construction alone; in addition to which would be required pumping stations and apparatus, the annual charges and operating expenses in connection with which Mr. Addicks testified would amount to several cents per thousand feet of gas sold, and which would involve a corresponding increase in operating cost or proper selling price of such gas," and on page 144 has found "Under the distributing system as now existing and in operation, it is not possible to fulfil the statutory requirements as to pressure. It would, however, apparently be possible to remedy this condition, at least to some degree, by dividing the City into different districts according to the varying levels and by regulating the pressure in each by district governors. The efficiency and safety of such gov-

errors is not free from doubt, and the evidence affords no sufficient basis for an estimate of the cost of their installation or the expense of making the necessary changes in the system of mains."

whereas he should have found that the distribution system as now existing is inadequate for the output of complainant; that by a proper increase of capacity in such system gas could be furnished at pressures within the limits of the statute; that the Welsbach burner gave as high an efficiency at 1½ pressure as at any other within reasonable bounds, and that heating appliances, requiring large volumes of gas, did not require higher pressure, but more adequate piping, as demanded in complainant's house piping rules and regulations; also that such cost for new construction was grossly exaggerated, being based on a rate of piping four times greater than the cost of complainant's mains laid under asphalt according to complainant's highest "or not for taxation purposes" estimate. Also that it appears both from the testimony and exhibits that
745 such governors have been in use throughout the stations of the complainant day and night, and when piping is adequate, with perfect success, and in overruling this defendant's Fifty-eighth Exception to the report of said Master in Chancery.

One hundred and eighth. In adjudging and decreeing, in paragraph V. of said decree, that the complainant has no adequate remedy at law for the injury which would result from the threatened enforcement either of the acts of the State of New York mentioned in the first and second, or in the Third and Fourth assignment of errors above, and that such injury would be irreparable, whereas complainant would have an adequate remedy at law as against the enforcement of either of said acts by defense to any application brought by this defendant or any other person in the courts of the State of New York for a mandamus or injunction to compel the compliance with said acts or for any other proper remedy, and complainant's remedy against the enforcement of penalties being by injunction against the enforcement of the clause concerning penalties, said clause being separable.

One hundred and ninth. In entering and making, in paragraph VIII. of said decree, a separate order and decree only as against William S. Jackson, as Attorney General of the State of New York, and William Travers Jerome, District Attorney for New York County, and each of them; whereas, said paragraph of said decree should have been a joint decree against this defendant also.

One hundred and tenth. In making and entering in paragraph IX. of said decree a separate decree against William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, and each of them; whereas, said paragraph of said decree should have been entered and made as a joint decree against this defendant also.

746 *One hundred and eleventh.* In adjudging and decreeing in paragraph VII. of said decree that the defendant, The City of New York and each of its officers, agents, servants and employees, are perpetually enjoined and restrained from suing for the penalty or forfeiture described in said chapter 736 of the Laws of

1905, or in any other way enforcing or attempting to enforce the said act against this complainant.

One hundred and twelfth. In adjudging and decreeing in paragraph VIII. of said decree that the defendants William S. Jackson, as Attorney General of the State of New York, and William Travers Jerome, as District Attorney of New York County, and each of them, and each of their agents, servants and employees, are perpetually enjoined and restrained fram suing for the penalty or forfeiture described in said chapter 125 of the Laws of 1906, or in any way enforcing or attempting to enforce the said act or the order of the Commission of Gas and Electricity aforesaid against this complainant.

One hundred and thirteenth. In adjudging and decreeing in paragraph IX. of said decree that the defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo B. Maltbie, John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, and each of them and each of their agents, servants and employees, are perpetually enjoined and restrained from applying for a mandamus or injunction to compel compliance with said chapter 125 of the Laws of 1906, or with said order of the Commission of Gas and Electricity, or in any other way enforcing or attempting to enforce the said act or the order of the Commission of Gas and Electricity aforesaid against this complainant.

One hundred and fourteenth. In adjudging and decreeing in paragraph X. of said decree that the complainant recover of the
747 defendants its costs and disbursements, to be taxed by the Clerk, one-half thereof to be paid by The City of New York and one-half thereof to be paid by defendant William S. Jackson, as Attorney General of the State of New York; and that said costs, so to be taxed, include the repayment to the complainant of the amount of fees and disbursements of the Special Master paid from a fund heretofore directed to be paid into Court by orders dated May 18, 1906, and June 16, 1906.

One hundred and fifteenth. In sustaining the report and action of the Master in Chancery in not allowing to this defendant sufficient opportunity to examine the complainant's properties, plant, books and papers in order to ascertain the cost of its properties, plant, etc., and other facts necessary to the proper conduct of its defense whereby this defendant was deprived of the opportunity of having a full, fair and impartial trial and in overruling in this respect this defendant's Second Exception to the report of the said Master in Chancery.

One hundred and sixteenth. In sustaining the report of the said Master in Chancery disallowing and refusing to make amendment V. requested by this defendant; whereas the same should have been allowed and in overruling this defendant's Eighty-sixth Exception to the report of the said Master in Chancery.

One hundred and seventeenth. In sustaining the report of the said Master in Chancery disallowing in part this defendant's Eighth Amendment and finding that by proper diligence it could have secured inspection of the plant at a much earlier date than it was in fact secured and this fact was repeatedly brought to the attention of

the defendants during the progress of the hearings; whereas he should have found as requested that the defendants made every effort to have the Master pass on their application for leave to examine the books, accounts and plants of the complainant, and failing to do so, finally sought relief by applying to the courts and in over-
748 ruling in this respect the defendant's Eighty-seventh Exception to the report of the said Master in Chancery.

One hundred and eighteenth. In sustaining the report of the Master in Chancery denying the motion made by this defendant at the end of complainant's case, to strike out the testimony of the complainant's witnesses, Bradley, Carter, Simpson, Addicks and Humphreys, and overruling the exception of this defendant to such denial.

One hundred and nineteenth. In sustaining the report of the Master in Chancery denying the motion of this defendant at the end of complainant's case to dismiss the bill of complaint and overruling the exception of this defendant to such denial.

One hundred and twentieth. In sustaining the report of the Master in Chancery denying the motion made by this defendant at the end of the whole case to dismiss the bill of complaint and overruling the exception of this defendant to such denial.

One hundred and twenty-first. In sustaining the report of said Master in Chancery denying the motion of this defendant for leave to introduce evidence in rebuttal and overruling the exception of this defendant to such denial.

One hundred and twenty-second. In sustaining the report of the said Master in Chancery denying the motion of this defendant for leave to examine the books and accounts of the complainant for the years 1903 and 1904, for the purpose of comparison with the books and accounts of the complainant for the year 1905, and overruling the exception of this defendant to such denial.

Dated New York, May —, 1908.

FRANCIS K. PENDLETON,
Corporation Counsel, Solicitor for Defendant City of New York.

749 Service of a copy of the within Petition for Appeal, Allowance and Assignments of Error is hereby admitted.

Dated New York, May 12th, 1908.

SHEARMAN & STERLING,
Solicitors for Complainant, 44 Wall Street, New York City.
W. S. JACKSON,
As Attorney General of the State of New York, in Person.
ROBERT C. TAYLOR,
Solicitor for Defendant William Travers Jerome, as District Attorney.
GEORGE S. COLEMAN,
Solicitor for Defendants William R. Willcox, William McCorroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District.

U. S. Circuit Court Southern District of New York. Filed May 13 1908. John A. Shields, Clerk.

750 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

It is hereby stipulated that the giving of a bond by The City of New York on the appeal taken in the above entitled action from the decree therein is hereby waived.

Dated New York, May 13th, 1908.

SHERMAN & STERLING,
Solicitors for Complainant, 44 Wall Street, New York City.

——— ———,
As Attorney General of the State of New York, in Person.

——— ———,
Solicitor for Defendant William Travers Jerome, as District Attorney.

GEO. S. COLEMAN,
Solicitor for Defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District.

751 [Endorsed:] 10307. United States Circuit Court, Southern District of New York. Consolidated Gas Company, Complainant, against William S. Jackson as Attorney General of the State of New York and others, Defendants. (Copy.) Stipulation Waiving the giving of a bond by the city. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. U. S. Circuit Court, Southern District of N. Y. Filed May 13th, 1908. John A. Shields, Clerk.

752 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILLCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

Citation.

To the above named complainant and all defendants other than the appellant below named, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the City

of Washington, District of Columbia, on the 18th day of May, 1908, at 12 o'clock M. of said day pursuant to an appeal filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein The City of New York is appellant, to show cause, if any there be, why the decree entered in the above entitled court and cause on the 3rd day of April, 1908, should not be reversed and set aside and speedy justice done to the
753 parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12 day of May, 1908.

C. M. HOUGH,
U. S. Dist. Judge.

Service of a copy of the within Citation is hereby admitted. Dated New York, May 12th, 1908.

SHEARMAN & STERLING,
Solicitors for Complainant, 44 Wall Street, New York City.
W. S. JACKSON,
As Attorney General of the State of New York, in Person.
R. C. TAYLOR,
Per WOLFF,
Solicitor for Defendant William Travers Jerome, as District Attorney.
GEORGE S. COLEMAN,
Solicitor for Defendants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District.

754 [Endorsed:] E. & A. C. 2737. 10310. United States Circuit Court, Southern District of New York. Consolidated Gas Company, Complainant, against William S. Jackson as Attorney General of the State of New York and others, Defendants. (Original.) Citation and admission of service. Francis K. Pendleton, Corporation Counsel, Solicitor for def't, City of New York, Hall of Records, Borough of Manhattan, New York City. Received District Attorney's office 7 p. m. U. S. Circuit Court, Southern District N. Y. Filed May 13, 1908. John A. Shields, Clerk.

755 Circuit Court of the United States, Southern District of New York. In Equity.

CONSOLIDATED GAS COMPANY, Complainants,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York, and Others, Defendants.

Petition for Appeal and Allowance.

The above named William S. Jackson, as Attorney General of the State of New York, conceiving himself aggrieved by the final decree entered on the 3rd day of April, 1908, in the above-entitled cause, doth hereby appeal from said decree to the Supreme Court of

the United States; William Travers Jerome, as District Attorney of the County of New York, having declined to join in this appeal as will appear from his letter hereto attached; and said defendant prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, April 14th, 1908.

(Signed) WILLIAM S. JACKSON,
Solicitor for the Defendant and Appellant, William S. Jackson, as Attorney General of the State of New York, Albany, N. Y.

And now to wit: on the 12 day of May, 1908, it is ordered that the appeal be allowed as prayed for.

C. M. HOUGH,
District Judge.

756 Copy.

DISTRICT ATTORNEY'S OFFICE,
COUNTY OF NEW YORK, *April* 13, 1908.

Wm. Travers Jerome, District Attorney.

U. S. C. C., S. D. N. Y.

CONS. GAS CO.
v.
JACKSON, Attorney General, etc.

Honorable William S. Jackson, Attorney General, etc.

MY DEAR SIR: I have consulted with my client, Mr. William Travers Jerome, the District Attorney, Etc., who is one of the defendants in this case. He informs me that he sees no necessity for his either taking any appeal, or joining in any appeal from the final decree entered in this proceeding upon April 3rd, 1908.

I transmit this letter to you through Senator Page, with whom I have discussed the matter over the telephone.

Respectfully yours,

(Signed) ROB'T C. TAYLOR,
Solictor for Wm. Travers Jerome, as District Attorney of New York County.

Endorsed: U. S. Circuit Court Southern District of New York. Consolidated Gas Company, against William S. Jackson, as Attorney General of the State of New York and others. Petition for Appeal and allowance. William Schuyler Jackson, Attorney General, Capital, Albany, N. Y. Due and personal service of a copy of within Petition for Appeal and allowance is admitted this 13th day of May 1908. Francis K. Pendleton, Solicitor for Defendant The City — New York. Geo. S. Coleman Solicitor for Wm. R. Willcox and others, constituting Public Service Commission for First District, Defendants. U. S. Circuit Court Southern District of New York. Filed May 14 1908. John A. Shields, Clerk.

757 United States Circuit Court, Southern District of New York.
In Equity.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney General of the State of New York, and Others, Defendants.

Assignment of Errors by the Defendant William S. Jackson, as Attorney General of the State of New York.

And now on the 14th day of April, 1908, comes this defendant, William S. Jackson, as Attorney General of the State of New York, and says that in the record and proceedings of the above-entitled cause there is manifest error in this, to wit: (The statute of 1906 hereinafter referred to being the statute known as Chapter 125 of the Laws of the State of New York for 1906, and the paragraphs hereinafter referred to being the paragraphs of the final decree as numbered and lettered therein).

I. That the matters and things charged in the bill of complaint show that the complainant has a complete and adequate remedy at law, by way of defense to any action that this defendant might bring to enforce the statute of 1906.

758 II. That the allegations in the bill of complaint and the facts disclosed by the record show that this suit, although in form brought by a citizen of the State of New York against this defendant as an officer of the State of New York is in fact brought against the State of New York, to test the constitutionality of the statute of 1906.

III. That the record does not contain sufficient evidence to show that the rate of eighty cents per thousand cubic feet for gas sold in the City of New York does not afford a fair and reasonable return to the companies doing business in the said City, the evidence being limited to the valuation of property and operations of the complainant alone and further that the record does not show but that the said rate would afford a fair and reasonable return upon the value of property employed in the making and distribution of gas by a company in same territory with the complainant, well located and equipped, and economically managed, but that the case was decided on the theory that if the statutory maximum price does not afford, in the opinion of the court, a sufficient rate of return upon the value of the property employed in its business of making and distributing gas by the complainant, the statute is void as to that company, irrespective of its effect upon other companies doing business in the same territory.

IV. That the record does not contain sufficient evidence to show the reasonable and necessary operating expenses of the complainant. The evidence being limited to its actual receipts and disbursements during a period from November 1, 1904 to December 31, 1905, in-

clusive, supplemented in part only by experience of other
759 periods and being entirely insufficient for that purpose.

V. That the valuation of the complainant's property upon which the court's calculation is based is an estimate of present value, arrived at by a valuation of the reproduction cost of complainant's identical plant and each part thereof, without regard to whether the same was originally economically produced or commercially and economically worth reproducing, or as to obsolescence of type and the advancement of the art. And not either upon the cost thereof, or the reproduction of a plant that would produce the same kind, quantity and quality of gas, in an economically constructed, modern plant.

VI. That in finding the valuation (paragraphs I and II) of complainant's real estate actually employed in its business of manufacturing and supplying gas at $11,985,435, is erroneous as being

(*a*) in excess of the original cost of such real estate to the complainant and its predecessor companies.

(*b*) in excess of the true valuation thereof, having been valued as vacant lots and not in conjunction with the buildings thereon, and for the uses and purposes to which it was devoted.

(*c*) in excess of the value at which it was carried on complainant's books.

VII. That the valuation (paragraph II) of the real estate, plants, mains and services and each of them are in excess of the valuation sworn to by the officers of the complainant in the return to the State Board of Tax Commissioners for the assessment of the franchise tax and the testimony of its officers before the joint committee
760 of the Senate and Assembly of the State of New York and are based entirely on the complainant's testimony and its experts.

VIII. That in finding (Paragraphs Ic and II) that the valuation of the intangible special franchises of the complainant is at least the sum of $12,000,000, whereas

(*a*) the complainant owns no special franchises not terminable at the will of the State of New York or of the City of New York.

(*b*) the franchises claimed by it, if owned, are not proper subjects of valuation in ascertaining the value of the property upon which it is entitled to earn a return,

(*c*) the record does not sustain the valuation.

IX. That in finding (Paragraph I*h*) the sum of $1,865,717.43, therein stated, represented more than a normal profit upon the volume of purchased gas, and in finding that the amount paid by complainant was paid under temporary expiring agreements, and did not include any reasonable recompense or return upon the value of the investment required to produce said gas, which findings are not supported by the record.

X. That in finding (Paragraph I*h*) that while the total net income for the year beginning May 1st, 1906, would remain the same upon the basis of the prices charged for gas during the calendar year 1905, yet if the prices for gas were reduced as provided by the statute of 1906 and by Chapter 736 of the Laws of 1905 the net in-

come of complainant for said year would be reduced to the sum of $3,024,592.45, on the ground that such finding is speculative and not supported by the record; and, in particular also

(*a*) In finding a probable increase in sales of gas tending to a reduction as aforesaid.

(*b*) In finding a probable increase in cost of gas obtained
761 from other companies, leading to such reduction.

(*c*) In finding a probable change in the source of manufacture of some portion of such gas, leading to such reduction.

(*d*) In overlooking the decrease in "Expenses" due to the reduction in the complainant's special franchise tax, payable to the State of New York, which would result from the diminution of its net profits through reduction of its rate for gas, said special franchise tax item being included by the court in the "Expenses" of 1905 to the amount of $406,909.23, as shown by the Master's report.

XI. In failing to make an express finding as to the present existence of the franchises claimed by complainant by derivation from the following corporations respectively (such failure in the case of each of such companies being separately assigned for error), whereas the court should have found that as to each of said franchises the complainant is no more than a holdover occupant, whose right of occupancy is terminable at the will of the State of New York or of the City of New York;

(*a*) The New York Gas Light Company.

(*b*) The Manhattan Gas Light Company.

(*c*) The Municipal Gas Light Company; and this alleged franchise was at all times invalid on account of lack of authority in the Mayor, Comptroller and Commissioner of Public Works to grant it.

(*d*) The Metropolitan Gas Light Company.

XII. In finding (Paragraph 1*h*) that the following franchise claimed by complainant exist and are owned by it and are sufficient to meet all its requirements (such finding in the case of each of such companies being separately assigned for error), whereas

762 (*a*) The alleged franchise claimed by derivation from the Anthracite Gas Lighting and Heating Company through the Knickerbocker Gas Light Company was invalid on account of lack of authority in the Board of Aldermen to grant it, and the alleged assignment thereof to the Union Gas Light Company was also invalid for lack of authority to assign it, and said alleged franchise in any case expires on September 17, 1913.

(*b*) The franchise claimed by derivation from the socalled State Grant through the Knickerbocker Gas Light Company was not assignable to, and did not even purport to be assigned to, complainant or either of its alleged predecessor corporations, and said franchise did not even cover any part of the City of New York, Borough of Manhattan, south of 79th Street.

(*c*) The franchise claimed by derivation from the Harlem Gas Light Company expired February 1, 1905, and as to that franchise complainant is but a holdover occupant, whose right of occupancy

is terminable at the will of the State of New York or of the City of New York, and said franchise did not cover any part of the City of New York, Borough of Manhattan, south of 79th Street.

XIII. In finding (Paragraph II) the total value of complainant's tangible assets employed in its business of manufacturing and supplying gas to be $47,831,435 and of its total property so employed to be $59,831,435.

XIV. In finding (Paragraph III) that the lowest rate of return which can be considered legislatively fair, just or reasonable, upon the value of the property employed by complainant in the business of manufacturing and supplying gas, is six per cent.

763 XV. In finding (Paragraph III) that the net annual income which the complainant can earn upon the property employed in its gas business as aforesaid is less than six per cent.

XVI. In finding (Paragraph IV) that complaince with the requirement in the statute of 1906 and in Chapter 736 of the Laws of 1905 as to pressure is commercially impossible under the rates for gas prescribed therein.

XVII. That in finding (Paragraph V) that complainant has no adequate remedy at law for the injury which would result from the threatened enforcement of the statute of 1906, and that such injury would be irreparable. Whereas, the complainant would have a complete and adequate remedy at law as against the enforcement of said act by this defendant by defense to any action for penalties brought in the courts of the State of New York, and whereas the penalty clauses of said statute of 1906 were misconstrued by the Circuit Court, and the penalties imposed thereby are neither unconstitutional in themselves nor so heavy as to justify the interposition of a court of equity and are severable.

XVIII. That in finding (Paragraph VI) that the statute of 1906 is void because in contravention of the fourteenth amendment to the Constitution of the United States in that it takes the complainant's property without due process of law and without just compensation, and deny to the complainant the equal protection of the law.

XIX. That in enjoining (Paragraph VIII) the defendant from suing for the penalty or forfeiture described in the statute of 1906.

XX. That in adjudging (Paragraph X) that the com-
764 plainant recover one-half its costs from this defendant as Attorney-General of the State of New York.

WILLIAM S. JACKSON,
Attorney-General of the State of New York,
Albany, New York.

Endorsed: U. S. Circuit Court, Southern District of N. Y., Consolidated Gas Company against William S. Jackson, as Attorney General of the State of New York and others. Assignment of Errors by the Defendant William S. Jackson as Attorney General of the State of New York. William Schuyler Jackson, Attorney General, Capitol, Albany, N. Y. U. S. Circuit Court, Southern District of N. Y., Filed May 12, 1908, John A. Shields, Clerk.

765 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY, Complainant,
against
WILLIAM S. JACKSON, as Attorney General, and Others, Defendants.

It is hereby stipulated and agreed that the giving of a bond on appeal herein by the defendant, William S. Jackson, as Attorney General of the State of New York, be and the same hereby is waived.

Dated, New York, March 13, 1908.

SHEARMAN & STERLING,
Solicitors for Complainant.
WILLIAM S. JACKSON,
Attorney General.

Endorsed: U. S. Circuit Court Southern District of New York. Consolidated Gas Company *vs.* William S. Jackson as Attorney General *et als*, Waiver of Bond on Appeal. William Schuyler Jackson, Attorney General, Capitol, Albany, N. Y. U. S. Circuit Court Southern District of New York. Filed May 14, 1908. John A. Shields, Clerk.

766 United States Circuit Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant.
against
WILLIAM S. JACKSON, as Attorney General of the State of New York; WILLIAM TRAVERS JEROME, as District Attorney of New York County; WILLIAM R. WILCOX, WILLIAM MCCARROLL, EDWARD M. BASSETT, MILO R. MALTBIE, and JOHN E. EUSTIS, Constituting the Public Service Commission of the State of New York for the First District, and THE CITY OF NEW YORK, Defendants.

To the above named complainant and all defendants other than the appellant below named, Greeting:

You are hereby cited and admonished to be and appear at a Term of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, on the 25th day of May, 1908, at 12 o'clock M. of said day pursuant to an appeal filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, wherein William S. Jackson, as Attorney General of the State of New York, is appellant, to show cause, if any there be, why the decree entered in the above entitled court and cause on the 3rd day of April, 1908, should not be reversed and set aside and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12 day of May, 1908.

C. M. HOUGH,
U. S. D. Judge.

767 [Endorsed:] E. & A. C. 2738. 10323. U. S. Circuit Court, Southern Dist. of N. Y. Consolidated Gas Company against William S. Jackson, as Attorney General of the State of New York and others. Original. Citation on Appeal. William Schuyler Jackson, Attorney-General, Capitol, Albany, N. Y. Service of a copy of within Citation on Appeal is admitted this 13th day of May, 1908. Dated. Francis K. Pendleton, Corporation Counsel, Solicitor for defendant, The City of New York. Shearman & Sterling, Solicitors for Complainant. Filed May 14, 1908. U. S. Circuit Court, Southern District N. Y. John A. Shields, Clerk.

SIR: Take notice that the within is a copy of — duly filed and entered in the office of the Clerk of —— County, on the — day of ——, 190—.

Yours, etc., WILLIAM SCHUYLER JACKSON,
Attorney-General, Attorney for ——.

To —— ——, Attorney for ——.

CITY AND COUNTY OF ALBANY, *ss:*

—— —— being duly sworn, says that he is — in the office of the Attorney-General of the State of New York; that said Attorney-General is the attorney for —— ——. Deponent further says that he did upon the — day of ——, 190—, serve upon the following named persons: —— ——, Attorney in the within entitled action, a copy of the annexed — by depositing the same, properly enclosed in a post-paid wrapper, in the post-office at Albany, N. Y., the post-office of the Attorney-General of the State of New York, directed to said Attorney, as aforesaid, the address within the State designated by — for that purpose upon the preceding papers in the action.

—— ——.

Sworn and subscribed before me, this — day of ——, 190—.

768 United States Circuit Court.

CONSOLIDATED GAS COMPANY
against
WILLIAM S. JACKSON ET AL.

It is stipulated that a single transcript of record be filed upon the three appeals from the final decree in the above entitled suit.

New York, May 13, 1908.

WILLIAM S. JACKSON,
Attorney General.
GEORGE S. COLEMAN,
Solicitor for Defendants Willcox et al.
FRANCIS K. PENDLETON,
Solicitor for City of New York.
SHEARMAN & STERLING,
Solicitors for Complainant.

Endorsed: U. S. Circuit Court, Southen District of N. Y. Filed May 13, 1908. John A. Shields, Clerk.

769 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from 9537 to 10324 inclusive, contain a true and complete transcript of part of the record and proceedings had in said Court, in the cause entitled Consolidated Gas Company, Complainant-Appellee, against Julius M. Mayer, as Attorney General, *et al.*, Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of May, in the year of our Lord One Thousand Nine Hundred and eight and of the Independence of the said United States the One Hundred and thirty-second.

[Seal U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. —— —— *vs.* —— ——. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

770 Supreme Court of the United States, October Term, 1908.

No. 396.

WILLIAM R. WILLCOX ET AL., Constituting the Public Service Commission of the State of New York for the First District, Appellants,
against
CONSOLIDATED GAS COMPANY OF NEW YORK.

It is hereby stipulated and agreed by and between the Solicitors and Counsel for the parties to the above entitled appeal, that James

H. McKenney, Esq., Clerk of the Supreme Court of the United States, be, and he hereby is authorized when printing the record of said appeal to print the pleadings therein in their proper chronological order in the front of said record.

Dated June 26, 1908.

F. K. PENDLETON,
Corporation Counsel and Solicitor and Counsel for Appellant The City of New York.
JOHN A. GARVER,
Solicitor and Counsel for Appellee,
44 Wall Street, City of New York.
JAMES M. BECK,
Solicitor and Counsel for Appellee,
44 Wall Street, City of New York.

771 WILLIAM S. JACKSON,
Attorney-General of the State of New York and Appellant and Solicitor and Counsel, in Person, 309 Broadway, City of New York.
ROBT. C. TAYLOR,
Solicitor for Defendant and Appellant William Travers Jerome, as District Attorney of the County of New York, Criminal Court Building, White and Centre Streets, City of New York.
GEO. S. COLEMAN,
Solicitor and Counsel for Appellants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District, No. 154 Nassau Street, City of New York.

772 [Endorsed:] 396. 21176. Supreme Court of the United States, October Term, 1908. William R. Willcox, *et al.*, constituting Public Service Com. of the State of New York for the First District, Appellants, against Consolidated Gas Company of New York. No. 396. (Original.) Stipulation that pleadings be printed in front of record. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. Due and timely service of a — of which the within is a copy, is hereby admitted. New York, ——, 190—. —— ——, Attorney for the ——. To —— ——, Esq., Attorney for the ——. Received Jun-29, 1908. Office of the Clerk, Supreme Court U. S.

773 [Endorsed:] File No. 21176. Supreme Court U. S. October Term, 1908. Term No. 396. Wm. R. Willcox, *et al.*, &c., App'ts, *vs.* The Consolidated Gas Co. of New York. Stipulation as to printing record. Filed June 29, 1908.

774 Supreme Court of the United States, October Term, 1908.

No. 397.

THE CITY OF NEW YORK, Appellant,
against
CONSOLIDATED GAS COMPANY OF NEW YORK.

It is hereby stipulated and agreed by and between the Solicitors and Counsel for the parties to the above entitled appeal, that James H. McKenney, Esq., Clerk of the Supreme Court of the United States, be, and he hereby is authorized when printing the record of said appeal to print the pleadings therein in their proper chronological order in the front of said record.

Dated June 26, 1908.

F. K. PENDLETON, *C. C.*,
Corporation Counsel and Solicitor and Counsel for Appellant The City of New York.

JOHN A. GARVER,
Solicitor and Counsel for Appellee, 44 Wall Street, City of New York.

JAMES M. BECK,
Solicitor and Counsel for Appellee, 44 Wall Street, City of New York.

775 WILLIAM S. JACKSON,
Attorney-General of the State of New York and Appellant and Solicitor and Counsel, in Person, 309 Broadway, City of New York.

ROBT. C. TAYLOR,
Solicitor for Defendant and Appellant William Travers Jerome, as District Attorney of the County of New York, Criminal Court Building, White and Centre Streets, City of New York.

GEO. S. COLEMAN,
Solicitor and Counsel for Appellants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District, No. 154 Nassau Street, City of New York.

776 [Endorsed:] 397. 21177. Supreme Court of the United States, October Term, 1908. The City of New York, Appellant, against The Consolidated Gas Company of New York. No. 397. (Original.) Stipulation that Pleadings be Printed in Front of Record. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. Due and timely service of a — of which the within is a copy, is hereby admitted. New York, ——, 190–. —— ——, Attorney for the ——. To —— ——, Esq., Attorney for the ——.

777 [Endorsed:] File No. 21177. Supreme Court U. S., October Term, 1908. Term No. 397. The City of New York, Appt., *vs.* The Consolidated Gas Co. of New York. Stipulation as to printing record. Filed June 29, 1908.

778 Supreme Court of the United States, October Term, 1908.

No. 398.

WILLIAM S. JACKSON, as Attorney-General of the State of New York, Appellant,
against
CONSOLIDATED GAS COMPANY OF NEW YORK.

It is hereby stipulated and agreed by and between the Solicitors and Counsel for the parties to the above entitled appeal, that James H. McKenney, Esq., Clerk of the Supreme Court of the United States, be, and he hereby is authorized when printing the record of said appeal to print the pleadings therein in their proper chronological order in the front of said record.

Dated June 26, 1908.

F. K. PENDLETON, *C. C.*,
Corporation Counsel and Solicitor and Counsel for Appellant The City of New York.

JOHN A. GARVER,
Solicitor and Counsel for Appellee, 44 Wall Street, City of New York.

JAMES M. BECK,
Solicitor and Counsel for Appellee, 44 Wall Street, City of New York.

779 WILLIAM S. JACKSON,
Attorney-General of the State of New York and Appellant and Solicitor and Counsel, in Person, 309 Broadway, City of New York.

ROBT. C. TAYLOR,
Solicitor for Defendant and Appellant William Travers Jerome, as District Attorney of the County of New York, Criminal Court Building, White and Centre Streets, City of New York.

GEO. S. COLEMAN,
Solicitor and Counsel for Appellants William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie, and John E. Eustis, Constituting the Public Service Commission of the State of New York for the First District, No. 154 Nassau Street, City of New York.

780 [Endorsed:] 398. 21178. Supreme Court of the United States, October Term, 1908. William S. Jackson as Attorney-General of the State of New York, Appellant, against The Consolidated Gas Company of New York. No. 398. (Original) Stipulation that pleadings be printed in front of record. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. Due and timely service of a —— of which the within is a copy, is hereby admitted. New York, ——, 190–. —— ——, Attorney for the ——. To —— ——, Esq., Attorney for the ——.

781 [Endorsed:] File No. 21178. Supreme Court U. S., October Term, 1908. Term No. 398. Wm. S. Jackson, as Att'y Gen'l., App't., *vs.* The Consolidated Gas Co. of New York. Stipulation as to printing record. Filed June 29, 1908.

(20, 554)

SUPREME COURT OF THE UNITED STATES

No. 217

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, APPELLANT

VS.

THE KNOXVILLE WATER COMPANY

Appeal From the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF FOR THE KNOXVILLE WATER COMPANY, Appellee.

Sketch of the Knoxville Water Company.

About the year 1879 the City of Knoxville, which up to that time had no public water supply, began to consider the subject of securing one. The plan first considered was for the City to build its own water works, but the expense of such an undertaking was greater than the City was willing to bear, and it was determined, finally, to secure the construction of such works through a private cor-

poration, and on the 1st day of July, 1882, the City entered into a contract with the Knoxville Water Company, the plaintiff in this cause.

See copy of contract, Printed Record, p. 602-606.

Certain parts of said contract should be mentioned. It was stipulated therein that the Water Company should erect, upon the land acquired by the City for that purpose, a system of water works, with reservoir and all other necessary appointments, to supply the City with water to be taken from the Tennessee River at the site furnished by the City. The plant was to be of the best material, constructed in a good and workmanlike manner, and of the dimensions contemplated by certain specifications prepared for the City by one Moses Lane. It was required that the reservoir should be built on the site indicated on a map prepared by said Lane, and should have a capacity of 3,200,000 gallons as specified by Lane. The reservoir was established and remains at this place. The water works as originally designed, were completed in the latter part of the year 1883 or early in the year 1884. The water was turned on June 4th, 1883, but the work of original construction seems to have continued into the year 1884.

In the early history of the Company there was a dispute between it and the City as to whether or not the Company had complied with the so-called Moses Lane specifications in the construction of the plant. On the

15th day of June, 1885, a bill was filed in the Chancery Court of Knox County, by the Water Company against the City.

See Transcript of said bill, Printed Record, p. 142.

In said bill it was alleged that the water was turned on the 4th day of June, 1883, and that the Water Company had complied with its contract and had been furnishing the City with water from seventy-five hydrants, and that the City was refusing to pay rent for the same. To this bill there was first a plea, which was overruled, and thereupon the City on the 3rd of August, 1885, filed an answer, in which it denied that the plaintiff had erected a system of water works pursuant to the contract. It is further averred in the answer that the City had employed one Moses Lane to prepare plans and specifications for water works for it, and that said Lane had prepared such plans and specifications, and that all agreements made by the City with the Water Company were based upon the Lane plans and specifications; that on or about June 12th, 1882, S. H. Cooke, Manager for the Knoxville Water Company, submitted a proposition to the City to build water works; that similar propositions were made by "different parties;" that the proposition of said Cooke was to build water works equal to that contemplated by the Lane plan as supplemented by one S. H. Lockett; but that the proposition finally voted upon and accepted by the City was that the Water Company should adhere strictly to the Lane plan and ignore the Lockett supplement.

Transcript Jan. 14, 1904, *Printed Record, pp.* 146-147.

The contract, as finally drawn, bound the Water Company to the construction of a plant in accordance with the Lane plan, with a single exception; that is to say, instead of the standpipe for fire purposes at the reservoir, as contemplated by the Lane specifications, the Company was to construct at the reservoir a system of by-pass pipes, by means of which the water, in case of fire, might be directed into the proper main by the direct pressure of the engine at the Pump Station.

Transcript of Jan. 14, 1904, *Printed Record, p.* 147.

In the answer of the City in said cause it was specifically averred against the Water Company:

"1. It had not built water works according to the Moses Lane plans, specifications as contracted.

"2. The said works and every part thereof are not the best standard material.

"3. The pipes are of less capacity than those required and contemplated by Lane's plan.

"4. The said works, and every part thereof, are not as good, ample, substantial, and of equal dimensions as contemplated and required by the specifications, schedules, drawings, maps and details prepared for the City by one Moses Lane, nor are the mains, pipes, hydrants, buildings, machinery, pumps and other appurtenances of quality equal to, but are inferior to that contemplated by said plans, specifications, schedules, drawings, maps, and details.

"5. Complainant never has built or erected a reservoir as required by its contract, of capacity and in manner and of material as required by contract.

"6. Complainant has not and cannot now furnish good and wholesome water for use of inhabitants of Knoxville as contemplated by said contract.

"7. Complainant has never built or erected a reservoir, or furnished water through or out of reservoir as contemplated by contract, but such water as it has furnished has been almost at all times muddy and not wholesome, and has not passed into or out of the reservoir, but direct from the river, whether muddy and unclean or otherwise.

"8. The pipe put down has been, and is, of less weight, less capacity, of inferior material than those contemplated by contract, and were not put down and placed on streets as contemplated and shown by map of city prepared by Moses Lane.

"9. Hydrants or fire plugs were not placed and located as required by contract.

"10. The Water Company had failed to repair streets according to contract.

"11. The Water Company had assigned its contract and all accounts and profits, and mortgaged its property.

"12. That the workmanship, material, and the water

furnished the City are all bad, and the water inferior to that contracted for, etc."

Transcript filed Jan. 14, 1904, *Printed Record, pp.* 148-149.

In the progress of the cause in which said answer was filed, thirty-one depositions were taken. The cause was heard in the Chancery Court of Knox County on the 4th of August, 1886, and the Water Company was given a decree for the entire amount sued for as hydrant rental, to-wit: $8,775.86, including interest.

Transcript Jan. 14, 1904, *Printed Record, p.* 151.

From this decree there was an appeal to the Supreme Court of Tennessee, wherein, on the 7th day of September, 1887, counsel for the City filed assignments of error, in which they insisted on substantially all the grounds of objection to the contract that had been set out in their answer already quoted herein. In the 8th assignment of error it is specifically insisted that:

"Complainant had not, at the time of bringing suit, and has not since, complied with its part of contract in this: that it never built works according to plan agreed upon; never built works in workmanlike manner; nor used proper materials; and had not finished work even as built within period required by contract, but used a wholly different plan, different weight and size of pipes,

and built works of a greatly inferior kind to that required by contract, and never having complied with its contract, cannot call upon or compel defendant to do so."

Dep. William Wheeler, Printed Record, p. 2186.

The decree of the Supreme Court in said cause was rendered on the 21st of October, 1887, and a copy of it is filed in this cause. A petition to rehear was filed in the Supreme Court, upon which that Court rendered a decree October 26, 1887, which is in part the following words:

"Be it remembered that this cause came on to be further heard before the Supreme Court of Tennessee upon all the proceedings heretofore had in this cause, but more especially upon the petition filed by the defendant to rehear this cause and the answer thereto. And the Court being of the opinion that there is no merit set up in the defense made by defendant to the suit of complainant, and that this is for that reason not a proper case to rehear, the Court is pleased to so decree, and to decree that said petition to rehear be, and the same is hereby dismissed."

S. ·opy of decree, Printed Record, p. 278.

We have set out these details as part of the history of the Water Company, and for the purpose of meeting

and refuting, at the outset, any charge that may be made to the effect that the Water Company did not in the beginning comply with its contract. It will appear, from what has been stated that every possible objection that could have been made to the claim of the Water Company was set up in said answer, and that all were overruled upon ample proof. At the time when said suit in the Chancery Court was brought, and when it was determined, the present owners of the Knoxville Water Works had no connection with it. The purchase of its stock by Messrs. William Wheeler and Chas. F. Parks occurred in December, 1890. In the year 1891 Messrs. Wheeler and Parks built for themselves the North Knoxville plant, which was conveyed by them to the Knoxville Water Company Nov. 17, 1893.

See copy of contract between Wheeler and Parks and Knoxville Water Company, being Exhibit 6 1-2 *to Dep. William Wheeler, Printed Record.*

Enlargements of the plant of the Knoxville Water Company were made by Wheeler and Parks as independent contractors, beginning in February 1894, and running through 1894 and 1895. The filter was built in the year 1894. The improvements at the Pumping Station were made in the latter part of 1894 and during 1895. The standpipe on Reservoir Hill was erected in the early part of 1894. All these improvements were made under the Wheeler and Parks contract above referred to.

In the month of May, 1899, negotiations were begun by Elbert Wheeler, acting for the Knoxville Water Company, for the purchase of the plant of the Lonsdale-Beaumont Water Company, and the actual consolidation of the Lonsdale-Beaumont Company with the Knoxville Water Company, as a result of these negotiations, occurred on the 1st day of January, 1900. But prior to the actual consolidation, the City of Knoxville, by an ordinance passed Oct. 20, 1899, had agreed to the consolidation.

Dep. Kimball, Printed Record, p. 2208, Exhibit No. 7 to the bill in this cause, Printed Record, p. 60.

The last large improvement, except in the laying additional pipe, occurred in the year 1900, and was the erection of the Intake Tower at the Pumping Station and the installation of new pumping machinery, including boilers, and extension to the Pumping Station.

As late as the year 1899, the City of Knoxville was content with the rates charged by the plaintiff, for in the consolidation ordinance and contract of that year, it was stipulated that the plaintiff should continue to furnish water at rates not exceeding those fixed by its existing rates and rules.

Exhibit 7 to bill in this cause, Printed Record, p. 60.

By Chapter 323 of the Acts of the General Assembly of the State of Tennessee, for 1897, the City of Knoxville

and the towns of West Knoxville, and North Knoxville, were consolidated, and by this Act of consolidation, it was provided that all valid and legal contracts of North and West Knoxville should be carried out and performed by the City of Knoxville, and this provision applied to the contract of North Knoxville with Wheeler and Parks, dated April 18, 1891, and to the contract between the town of West Knoxville and the Lonsdale-Beaumont Water Co., dated September 17, 1892, which contracts are on file in this cause as Exhibit No. 3 and No. 5 to the original bill.

Prior to the consolidation of the three towns, and on the 1st day of April, 1895, the Water Company had published and put in operation a schedule of water rates. Subsequent to the publication of these rates, and on the 17th of May, 1895, the City of Knoxville passed an ordinance dealing with meter rates to be charged by the Water Company, but in fact adopting the meter rates already in force by the voluntary act of the Company. Water rates were limited under the original contract, by meter, and have been further limited under each succeeding contract by each of said three towns. In the ordinance contract permitting the consolidation with the Lonsdale-Beaumont Company passed Oct. 20, 1899, it was stipulated that the rates provided in the contract between the Lonsdale-Beaumont Company and West Knoxville on Sept. 17, 1892, should continue in effect as to the original territory of West Knoxville, which then became the 10th Ward of the City, and that the water supplied said 10th Ward should be equal in quality to that then supplied by the Knoxville Water Company. It was further

stipulated in said ordinance contract, that the Knoxville Water Company should continue to furnish the inhabitants of the other Wards of the City, than the 10th, filtered water at a maximum rate not to exceed the schedule of rates then in force. This was the first provision requiring the Water Company to furnish filtered water that appears in the legislation of the City of Knoxville, although there had been a similar provision in the North Knoxville contract. By said ordinance contract, the right of the City reserved in its contract of July 1, 1882, to purchase the property of the Water Company was extended so as to include, not only the plant in the old City, but all property which the Company then owned or might thereafter acquire.

In January, 1900, an ordinance was introduced in the City Council of Knoxville to regulate and reduce water rates of the plaintiff, but was not passed.

See bill in this cause, Printed Record, p. 8.

Thereafter, on the 15th day of June, this ordinance which had failed in January, was again introduced, and after amendments was passed on the 27th day of July, 1900. It provided a heavy penalty, to-wit: not less than $10 nor more than $50 for any violation of it, and certain prosecutions thereunder were begun against the plaintiff which continued to charge the rates under the ordinance contract of 1899. These prosecutions were tried before the Recorder of the City, and plaintiff was fined $50 in each case and sentenced to the workhouse of Knox County in default of payment of said fines. The plaintiff ap-

pealed to the Circuit Court of Knox County, where the defendant was proceeding to prosecute said cases when it was discovered that said ordinance was defective. Thereupon, on March 30, 1901, the City passed another ordinance by which it attempted to cure the defects in the earlier one, but re-enacted therein the same rates. A copy of said ordinance of March 30, 1901, is filed as Exhibit 8 to the bill in this cause.

About the 1st day of May, 1901, the City brought suit before its Recorder against the Water Company, which had still continued to charge the rates approved in the ordinance contract of Oct. 20, 1899, charging the Company with violation of the ordinance of March 30, 1901, in charging one W. K. McClure, for water at rates in excess of those allowed by said ordinance. This suit was tried before the Recorder and another work-house judgment rendered against the Water Company. The case was appealed to the Circuit Court of Knox County and tried there by the Judge without the intervention of a jury, and a judgment rendered declaring the ordinance of March 30, 1901, invalid because it had been passed at two special meetings not held as required by law. The City appealed to the Supreme Court of Tennessee, where the Water Company not only insisted that said ordinance of March 30, 1901, was invalid because passed at irregular special meetings, but also because it impaired the obligations of contracts existing between the City and the Water Company, and deprived the Company of its property and liberty without due process of law, and was, therefore, in contravention of the Constitution of the United States and of the State of Tennessee. The Su-

preme Court of Tennessee held the ordinance valid, and entered judgment against the Water Company for $10 and costs, but the Supreme Court of Tennessee did not pass upon the question of the reasonableness of the water rates charged by the Company, but upon that point said, in its opinion:

"No such case is before us now, as the question of the income and profits of the Water Company has not been opened up nor considered, and the naked question here, being the power to regulate the rates as the City in its judgment may deem right and just."

Printed Record, Cause 212, *Supreme Court of the United States, pp.* 265-266.

See also the following, from the judgment of the Supreme Court:

* * * "Judgment will be entered here in favor of plaintiff but without prejudice to the defendant's right to litigate and show in such way as it may be advised, that the rates prescribed by said ordinance of March 30, 1901, are unreasonable and oppressive—that question not having been considered by the Court in deciding this case."

Printed Record, Cause 212, *p.* 282.

The case was then appealed to the Supreme Court of the United States.

It is stipulated in this cause that the decree of the Supreme Court of Tennessee was affirmed by that Court.

See stipulation of Counsel, Dep. Kimball, Printed Record, p. 2250.

While the case just referred to was pending in the Supreme Court of Tennessee, the defendant passed a third ordinance on the 4th of October, 1901, which is in all respects similar to the one passed March 30, 1901. Said ordinance of October did not repeal the March ordinance, but was passed to meet the probable holding by the Supreme Court of Tennessee that the March ordinance was void because not passed at legal meetings.

At this point it becomes necessary to revert to an earlier period in the history of the Company. The contract between the City and the Water Company extended, by its terms, for the period of thirty years from January 1, 1883, unless the City should become the owner of the plant within that period in the manner stipulated in the contract.

Printed Record, Cause 212, *p.* 25.

By the 11th Section of said contract, it was stipulated that the Water Company should forthwith take steps to amend its charter so as to prohibit it from issuing bonds in excess of $125,000 for the period of five years from the date of the contract, and after that time from issuing additional bonds in excess of $25,000. Said Section stipu-

lated that the indebtedness of the Company, by bond, should not exceed the amount of $150,000.

Printed Record, Cause 212, *p.* 25.

In this connection it is proper to state that in the ordinance contract of Oct. 20, 1899, the following provisions relative to bond issues of the Company occur:

"Sec. 5. That in order that the consolidation hereinbefore provided for may be effected and to enable the Knoxville Water Company and the Lonsdale-Beaumont Water Company to fund their existing debts and obligations and to provide funds to improve the consolidated plant and make extensions thereto, and in consideration of the benefit to be derived therefrom by the City of Knoxville and its inhabitants, the Knoxville Water Company shall guarantee or fund the existing debts of said Companies, and said Knoxville Water Company is hereby released from that provision of its contract with the City of Knoxville, dated July 1, 1882, as aforesaid, limiting its indebtedness to $150,000, and such provision or limit in said contract is hereby abrogated and annulled.

"Provided, however, that not more than eight hundred thousand dollars ($800,000) of bonds shall be issued prior to the 1st day of January, 1901, and provided further that no bonds in excess of eight hundred thousand dollars ($800,000) shall be issued except to provide funds for additions to or improvements of plant and property of said Knoxville Water Company, and for any bonds to be issued, said Knoxville Water Company shall file with the Recorder of the City of Knoxville a sworn certificate

showing the actual cost of such addition or improvements, for which bonds may be issued."

Printed Record, Cause 212, *pp.* 61-62.

By this ordinance contract, therefore, the City, not only removed the original bond limit of $150,000, but by necessary implication approved all actions of the Water Company creating debts against its property, and in effect agreed that the plant already constructed by the Company was sufficient to support a bond issue of approximately $800,000.

It was demonstrated early in the history of the Company that the limitation of the bond issue to $150,000 would be fatal to efficient management and would render it impossible for the Company to carry out its contract with the City. The first result of this unreasonable limitation was that, prior to the time when Messrs. Wheeler and Parks acquired control of the property, at the end of the year 1890, the Company had issued $85,000 of "debenture certificates" bearing 6 per cent. interest.

Dep. Elbert Wheeler, Printed Record, p. 721

All of these debentures, however, have now been retired.

Dep. Elbert Wheeler, Printed Record, p. 781.

These debentures were printed notes with coupons attached, and had no security except the note of the Treas-

urer, authorized by the Directors, and were not an encumbrance on the property in the nature of a mortgage.

Dep. William Wheeler, Printed Record, p. 460.

It is stated in our bill in this cause, and is not denied, that in 1890 and again in 1893, the Water Company asked for permission from the City to issue additional bonds to build a new Pumping Station, a new Reservoir and Filtering Plant, and to make other improvements to meet the growing needs of the inhabitants of the City, but two different ordinances granting such permission, after having been passed by the City Council, were vetoed by the Mayor.

Bill, Printed Record, p. 11.

It is further alleged that in consequence of this unjust and unreasonable refusal, the Company was compelled in 1893 and 1894 to issue and sell $295,000 of what has been called preferred stock, which was issued by consent of all stockholders, and bears the same relation to the Company as a bond, in that it entitles the holder to receive interest at the rate of 6 per cent. per annum before the stockholders receive anything on their stock. The money thus realized was spent in improvements and enlargements of the plant.

Bill, Printed Record, p. 11.

The so-called preferred stock is, therefore, in legal effect and in fact, a part of the bonded debt of the Company.

Of the effort to enlarge the bond limit William Wheeler says:

"When we became interested in this property in 1890" * * * * "there was no auxiliary pumping machinery to use in case the main machine fell down for any reason; the capacity of that pumping machinery had already been reached by the consumption of water at that time. The water itself was in a very unsatisfactory condition, being river water without purification or clarification. There was an active demand for the extension of the service which it was the policy of the Company to avoid so far as it could possibly do so without running counter in an excessive degree to public demands. There was need of various other improvements, none of which could have been made without the investment of substantial amounts of additional capital. The Company had endeavored, I was advised, to secure an increase in the limit of bonds which it might issue, in order that it might avail itself of the usual resources of obtaining capital, that is upon a pledge of the security of its property, but that effort had failed. Immediately after Wheeler and Parks became interested in the property, they renewed the effort to interest the City in the removal of that limitation as to the amount of bonds which could be issued, and submitted a draft for an ordinance to the City Council, within three months after they became interested in the property, in the month of February, 1891, but that

ordinance as I stated, while passed by the City Council was vetoed by the Mayor."

Dep. William Wheeler, Printed Record, pp. 705-706.

Mr. Wheeler further says:

"When the next City Council came in in 1893, they" (Wheeler and Parks) "renewed their negotiations, and I personally (on behalf of the Company at that time as were the negotiations of 1891 in behalf of the Company) submitted a draft for an ordinance to the City of Knoxville, which was first made acceptable to the Committee on Water before its presentation to the City Council, and was passed by the Council. That ordinance was vetoed by the Mayor and was withdrawn by us from action by the Council upon the Mayor's veto, because in the meantime the Legislature had cut out the 10th Ward, in which a substantial part of the extensions specifically provided for in that ordinance were to have been made."

Dep. William Wheeler, Printed Record, p. 706.

Thereupon, it became necessary to issue preferred stock above referred to, and following that issue, the contract was made with Wheeler and Parks under which that firm made the large extensions of the plant above referred to.

Dep. William Wheeler, Printed Record, p. 707.

These improvements included, as we have shown, the large, expensive and efficient Filter Plant, which was thus voluntarily constructed by the Company, which was under no legal or contract obligation to build the same.

These statements show the extraordinary facts:

1st. That the bond limit fixed by the City was so low that it was impossible for the Company to make any extensions of its plant or to maintain the existing plant in a state of efficiency.

2nd. That with persistent injustice the City refused, until the end of the year 1899, to enlarge this bond limit, although it was known at the date last mentioned that the value of the plant of the Water Company exceeded many times over the amount of bonds authorized.

3rd. That in its answer filed in the Chancery Court in 1885, the City objected to the quality of the water and of the plant, and the Supreme Court held that none of the objections were well taken.

4th. That when, in 1891, it was apparent that the needs of the City required improvements and extensions of the plant, the City refused to enlarge the bond limit, and two years later in 1893, repeated its refusal, both refusals resulting from the act of the Mayor when the proposed policy of the Water Company had been approved by the votes of the majorities of two successive City Councils.

5th. That the City in this litigation attacks the quality of the plant, despite the fact that after sixteen years

it persisted in a policy of unreasonable obstruction of all improvements of it.

6th. That while the City feebly and unsuccessfully attempts in this cause to show that the water furnished is infected by reason of the drainage from White Spring Branch, the Reservoir and Pumping Station are placed where the Water Company was compelled, by its contract with the City, to place them, and where it was compelled by the City's action to allow them to remain when it desired and attempted to locate them differently.

In view of the fact that the Reservoir and the Pump Station were thus located by contract, and that the City has refused to permit their removal and thereby required the expensive Filter Plant, Intake Tower, and Pumping Station to be erected where they are, it is submitted that the city, would be estopped by its own conduct to complain of anything resulting from so locating and maintaining these parts of the plant. But there is no foundation for the criticisms attempted by the City's witness.

GENERAL STATEMENT.

This case is before the Court upon an appeal by the original defendant, the Mayor and Aldermen of the City of Knoxville, from a decree in equity, of the Circuit Court for the Northern Division of the Eastern District of Tennessee. The original bill in the cause was filed at Knoxville, Tennessee, December 7, 1901, for the purpose of enjoining the Mayor and Aldermen of the City of Knoxville from enforcing a certain ordinance of said Board, passed March 30, 1901, to regulate the rates charged to consumers by the Complainant, the Knoxville Water Company, on the ground that said ordinance was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States, in that it undertook to deprive the Complainant of the right to charge such rates as would afford a fair and reasonable return on its investment, thereby depriving it of its property and liberty without due process of law.

Printed Record, pp. 15-16.

Thereafter, by leave of the Court, the bill was amended by the following allegation, to-wit:

"That the fair value of the property of plaintiff within the City of Knoxville, as of date March 30th, 1901, exceeds $1,000,000, and has constantly increased in value at all times since said date, which said property of said value was at said date and at all times since used in the public

service for the purpose of supplying said City with water, and that the effect of the ordinance of March 30th, 1901, of defendant reducing the water rates of plaintiff, if enforced, is to deprive the plaintiff of a fair and reasonable return upon its said value of said property so used, and for that reason said ordinance is unconstitutional and void.'

Printed Record, pp. 279-280.

There was a demurrer to the original bill.

Printed Record, p. 70.

and also a demurer to the amended bill

Printed Record, p. 200.

These demurrers were overruled by the Court but no exceptions were reserved to the action of the Court in overruling them, and no question is made thereon in the assignments of error herein, for which reasons no further mention need be made thereof.

Printed Record, p. 281.

It is charged in the bill that the effect of said ordinance of March 30th, 1901, for the fiscal year ending on that date, would be to reduce the income of the Water Company from $88,649.41, the amount realized from existing rates, to $68,481.67; a reduction of almost 23 per cent.

Printed Record, p. 12.

The answer admits that the average reduction of rates, as prescribed by said ordinance, would be about 20 per cent.

Printed Record, p. 84.

The answer denies generally, the other allegations of the bill.

Printed Record, pp. 73-92.

The answer and exhibits thereto were filed January 14, 1902.

Printed Record, p. 108.

The replication of Complainant was filed January 16, 1902.

Printed Record, p. 108.

Nine months thereafter, or on the 6th day of October, 1902, the cause was referred to a Special Master, who was ordered to report:

"First.

The amount invested by plaintiff in its entire plant and property.

Second.

The amount invested in the corporate limits of the City of Knoxville, including machinery, apparatus, and

all appliances and property of every kind used in the operation of the water plant within said corporate limits.

Third.

The amount and character of plaintiff's indebtedness and the property covered by it March 30th, 1901.

Fourth.

The value of plaintiff's entire plant and property at the time of the passage of the ordinance of March 30th, 1901.

Fifth.

The actual value of the plant and property within the corporate limits of the City of Knoxville, including the machinery, apparatus and all appliances and property of every kind used in the operation of the plant within said corporate limits when the ordinance of March 30th, 1901, was passed.

Sixth.

The gross revenue derived by plaintiff from its entire water plant and property under the rates in effect prior to March 30th, 1901, and how much same would be reduced by said ordinance of March 30th, 1901.

Seventh.

The total revenues derived by plaintiff from water supplied within the corporate limits under rates in effect prior to March 30th, 1901, and how much same would be reduced by said ordinance of March 30th, 1901.

Eighth.

An itemized statement of plaintiff's expenses per annum and what part of same pertains to the property within the corporate limits of the City.

Ninth.

The extent and kind of investigation made by defendant before the passage of the ordinance of March 30th, 1901, the notice given to plaintiff, when and by whom.

Tenth.

What would be a fair amount to allow annually for depreciation of the water plant and property of plaintiff from natural causes and by wear and use and depreciation accrued to March 30th, 1901.

Eleventh.

Whether or not the rates fixed by Defendant's ordinance of March 30th, 1901, are reasonable and would afford or permit a reasonable income on the capital invested in the plant and property by plaintiff.

The Master will take proof with all reasonable dispatch and will, if possible, file his report in time for action at the next term of this Court.

Twelfth.

The Special Master will report on any other special matter or question about which he is specifically requested to report by either side in writing within ten days

after entry of this order, said requests to be filed and made part of the record. In case an irrelevant or unnecessary inquiry is opened up by such a request the cost thereof will be taxed against the party making such request and the Master will report what, if any, needless costs are thus caused."

Printed Record, pp. 122-123.

It is recited in the caption of said Order of Reference, as follows:

"This cause by consent of parties and for special reasons appearing to the Court is referred to H. O. Ewing as Special Master, who is ordered to hear all proof offered by plaintiff and defendant and to report to this Court as follows:"

Printed Record, p. 122.

It will be observed by the Court that to this order and action of the lower Court no exception whatever was taken at the time, nor thereafter, as will more fully appear. It further appears that the form and substance of this Order of Reference, as to the matters referred, was adopted by the Court after suggestions from both the Complainant and the Defendant.

Printed Record, p. 117.

Complainant made certain suggestions as to matters to be referred, which are not material to the matters

here presented, but Defendant, at pages 196 to 197 of the Printed Record, presented 24 items of reference with a request that they be submitted by the Court to the Special Master. After consideration of the suggestions of Complainant and Defendant, the Court adopted the Order of Reference as set out above from the 1st to 12th inclusive. It will be noted by the Court that Sec. 12 of the Order of Reference, as adopted by the Court, directs the Master to report upon any other special matters or questions about which he may be specifically requested to report by either side, in writing, within ten days after this order, such requests to be filed and made part of the record. In obedience to the suggestion of the Court, in item 12, the Defendant, at pages 124, 125 and 126 of the Printed Record, presented 13 additional matters to be referred and reported on by the Master. The paper containing these requests of Defendant is as follows:

"The Court having ordered and directed the Special Master, H. O. Ewing, appointed in this case, to report upon any special matters or questions, that either party shall request him to report upon, in writing, the defendant, the Board of Mayor and Aldermen of the City of Knoxville, hereby in compliance with said order, request the Special Master to report upon the following matters or questions in addition to those specifically set out in the II Section of the Order of Reference."

Printed Record, p. 124.

The first item covered by these requests of Defendant is as follows:

"Whether the rates fixed by the defendant's said ordinance of March 30th, 1901, was reasonable and would afford or permit a reasonable income on the fair value of the Complainant's property, actually being applied to and in use for public purposes, at the date of the passage of said ordinance, taking into consideration the rights of the public as well as the rights of the stockholders of said Company; and in this connection he will report the relative values of that portion of the property applied and used within the City limits, and of that portion lying outside of the limits of said City of Knoxville."

Printed Record, p. 124.

The 12th item is as follows:

"Whether the amount invested by the Complainant Company in its plant and property was reasonably and necessarily required in its construction and operation."

Printed Record, p. 125.

To certain items in the original draft of form of Order of Reference by Defendant, Complainant filed written objections, to wit: To Nos. 12 to 24 inclusive, the first 11 items of Defendant's proposed draft being embraced already in Complainant's proposed draft of said Order of Reference.

Printed Record, pp. 114-115-116.

On objections being made by the Complainant to the

investigation before the Master of certain matters called for in the additional requests of Defendant,

Printed Record, pp. 119-120-121,

the Court ruled:

"In taking the evidence and directing the inquiry before him, the Special Master possesses the usual powers of Masters in Chancery, and is hereby expressly invested with power and authority to determine what subjects are relevant and pertinent matters of inquiry under the foregoing Order of Reference, and also the proper method of proceeding, or requiring the production of evidence, and of what is the primary or best evidence of any disputed fact, and in any and all questions arising in regard to the relevancy of any subject of inquiry, and the right to call for, or introduce, any part of evidence. The Master will, of course, determine such issues, and for that purpose will hear such arguments as satisfies him in regard to these matters.

"Ordered that this may be substituted for paragraph No. 12 in the Order of Reference heretofore made, which paragraph is hereby vacated."

Printed Record, p. 289.

The said final order of the Court, giving final instructions as to the scope of the reference, was made Nov. 21, 1902.

Printed Record, p. 289.

On the 5th day of December, 1904, Printed Record, p. 199, the Defendant by petition raised, for the first time, an objection to the fact that the original Order of Reference appears on the record to have been granted by consent, though as appears from said original Order and the action of Defendant thereunder, no exceptions ever had been taken either to the fact of the Reference, or to the form in which the Reference had been finally ordered. Said petition of Defendant, filed on the date above mentioned, is found on pp. 192-193 et seq., Printed Record. And acting upon said petition, the final order of the Court, made *nunc pro tunc*, and entered of date December 10, 1904, was as follows:

"In this cause it appears that the order of reference erroneously states that it was made by consent of parties, and it is ordered that the same be and is corrected, by striking out and annulling the phrase 'by consent of parties,' as having been inadvertently inserted.

It is further ordered that the record show that the parties waived objection to the appointment of the Clerk as Special Commissioner to state the account, which is accordingly done.

It is further ordered that the record show that when the case was called for hearing the defendant announced ready for trial, and that the order of reference embracing the eleven propositions was thereupon submitted by the Plaintiff, before any proof had been taken, and that the Defendant took exception to some of the propositions submitted, and submitted other and additional propositions, all of which were submitted by the parties for the

Court's action, who thereupon added Section 12 to the original Order of Reference.

And thereupon the Defendant, pursuant to said section 12, filed the additional sections to the order which are found in the record.

Upon a controversy arising as to the admission of evidence the Court struck out Section 12 of the order of reference, and substituted in its place the order found on file in the record.

This order is made *nunc pro tunc*, for sufficient reasons appearing to the Court."

Printed Record, p. 280.

It will be observed likewise that no exception is here taken to the form nor fact of the order granted by the Court referring the matters in controversy in this case to a Master for report thereon, nor is it claimed by Defendant in said petition that it had ever excepted to the fact or form of said order, so that, from these facts, it will appear that, while formal consent was not given to the Court's action in referring certain matters deemed proper by the Court to be reported on by the Master, no legal objections nor exception was taken thereto, and the question whether the Court should have made such reference at all is manifestly not open to examination in this Court, and the order which was actually entered, under the circumstances above set out, must have all the force and effect of a consent order, and for

that reason, to the extent that the Master has reported upon matters of fact and his conclusions thereon which have been concurred in by the Court, such concurrent action of the Court and Master upon such matters of fact, under the decisions of this Court, must be binding to the extent now to be stated.

The taking of the testimony in the cause, before the Master, began on the 10th day of November, 1902.

Printed Record, p. 321.

The last deposition was taken January 25, 1904.

Printed Record, p. 2249.

and the testimony covers 1928 pages of the printed record now before the Court. The Record will show that the Master gave diligent attention to the taking of testimony, and that the nature of the proceedings was such as to require him to pass frequently upon the admissibility of evidence, and upon many questions of law, raised during the long investigation. These facts are mentioned in order to show the extent and thoroughness of the investigation made by the Master, and his competency to determine the questions involved. After this long and thorough investigation by the Master, and a comprehensive and perspicuous report by him, the case was presented to the Circuit Judge, who, in an elaborate and carefully prepared opinion, concurred in the report of the Master in all material respects. It is stated several times in Defendant's brief that the Special Master was

not a lawyer. The record is silent on this question, but in view of the statement of Defendant's counsel, we state that the Special Master was a member of the Bar of Tennessee and of the United States Courts, of high standing, when he was appointed Clerk of the United States Circuit and District Courts.

We have, in the case at bar, not only, as hereinbefore shown, a reference, in effect by consent, in the absence of objection, but the special request of the Defendant for a finding upon an issue which was determinative of the case, and within which issue as submitted, are comprised all the other material issues submitted to the Master for determination by the Court and regarded by the Court as determinative of the question whether or not the ordinance of Defendant is unconstitutional. This special matter so to be reported on at the request of the Defendant was in fact answered by the Master, the same being request No. 1 of Defendant, which is as follows:

"Whether the rates fixed by the Defendant's said ordinance of March 30th, 1901, was reasonable and would afford or permit a reasonable income on the fair value of Complainant's property, actually being applied to, and in use for public purposes, at the date of the passage of said ordinance, taking into consideration the rights of the public, as well as the rights of the stockholders of said Company and in this connection he will report the relative values of that portion of the property applied and used within the City limits, and of that portion lying outside of the limits of the said City of Knoxville."

Printed Record, p. 117.

The Master answered this question in the negative.

Printed Record, p. 187.

The Court will observe, from what has been stated, that no objection was made on the trial, nor presented to the Court below to the reference of the case to the Master, and that there was a positive request by Defendant for certain specific findings, and the general rule in such cases is that objections not made on the trial of the case or presented to the Court below for decision, cannot be entertained in the Appellate Court.

Taylor on Jurisdiction and Procedure of the United States Supreme Court, Sec. 426, *citing numerous decisions of this Court in the text.*

This principle is also illustrated by the well known rule of this Court that where the Circuit Judge has charged the jury in the trial Court, and has committed affirmative error, such error will receive no attention in this Court unless an exception thereto was taken at the time given.

Baltimore and P. R. Co. vs. Mackey, 157 *U. S.,* 92. *Anthony vs. Louisville & Nashville Railway Co.,* 132 *U. S.,* 173.

and numerous other cases cited by Taylor, in the work above referred to, at Section 429.

In addition to these general observations we note that this Court has said in a case of this kind that:

"We are all of opinion that a better practice is to refer the testimony to some competent Master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable Master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

Chicago, Milwaukee, &c., Ry. vs. Tompkins,
176 *U. S., p.* 180.

As to the effect then of a finding by the Master, confirmed by the Court in a case thus referred, and without exception taken by defendant, and in fact with the questions referred at Defendant's special request, this Court has said:

"As the case was referred by the Court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat. Sec. 649, or in an admiralty cause appealed to this Court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility

of witnesses, or so far as there is any testimony consistent with the findings, it must be treated as unassailable."

Davis vs. Schwartz, 155 *U. S., p.* 636.

We therefore insist, under this record and the law applicable thereto, that the concurrent finding of the Court and Special Master in this case is unassailable if there be any evidence to support the same.

ASSIGNMENTS OF ERROR

In view of the form and substance of the brief filed herein by Appellant, we desire to refer to the rule of this Court which provides with respect to briefs filed for Appellant as follows:

"This brief shall contain in the order here stated,

1.

A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

2.

A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged, etc."

In the case at bar counsel has entirely ignored this rule of the Court; the first nine pages of the brief are

taken up by an inaccurate statement of the case, and under the heading on p. 9, "Statement and Discussion of Assignment of Errors," no reference whatever is made to the assignments of error which were made on the appeal in the Court below to the action of the Circuit Judge, but on the contrary, pages 9 to 39 inclusive of defendant's brief is taken up with the discussion of the question whether or not there is any contract forbidding the City's regulation of the Water Company's rates to consumers, which above question is not in the case at this time, as likewise the question next discussed from pages 11 to 39, without reference to any assignment of error to that effect, that the said ordinance of the city regulating rates was not void for want of notice, hearing or investigation before or on its passage. It was known to counsel for Appellant that upon the hearing below no insistence was made by counsel for Complainant that said ordinance was not valid because of the want of notice, hearing or investigation before or upon the passage, although it is charged to that effect in the original bill following the line of the case of New Memphis Gas Company vs. City of Memphis. It was realized and conceded by counsel for complainant that, since the decision of the above case, in many of the decisions of this Court it has been recognized that a Legislature or Municipal Board may fix rates without a hearing upon the same and that the hearing as to the reasonableness of said rates in the constitutional sense is a judicial question and must be determined without reference to hearing or lack of hearing on the part of the regulating legislative power. When the City sought to regulate Complainant's rates, the lat-

ter was most earnestly insisting in good faith, that its contract with the City could not be impaired as to its obligation by a reduction, which claim, however, was not sustained by this Court, but this *bona fide* claim refutes the argument that the Company continuously refused to furnish the information asked on which to base a reduction. Following the discussion of the above question, counsel for Appellant without reference to the assignment of errors has gone into a general discussion from pages 40-195 of the entire record, discussing matters not at all relating to any questions made by the assignment of errors and apparently intended to take the mind of the Court away from the real questions presented by the assignment of errors, which questions alone under the rule of this Court are the matters calling for action herein. Counsel does, however, from pages 195-231 attempt to go into the questions presented by the assignment of errors, but in so doing has confused rather than elucidated the issues before this Court by attempting to assign and discuss alleged errors not assigned below. It cannot be expected in this reply brief that we shall discuss anything in the case except the questions before this Court raised by the assignment of errors below, and for that reason we go into the discussion of the assignment of errors *seriatim*, believing that we can render assistance to the Court upon the only questions now before it. It is true that in the voluminous brief prepared by counsel for Appellant many of the subjects referred to in the previous assignments are treated, but the same are treated without reference to the assignment of errors and is so commingled with treatment of matters not embraced in any assignment of error as to be absolutely

misleading to the Court. In preparing this brief we have taken up the assignment of errors in the order in which they appear, as presented to the Court below as nearly as possible. We do not regard the arrangement as logical but have felt constrained to adopt it in order to avoid confusion. It will appear that certain matters are covered by more than one assignment of error, and where this is the case we have endeavored to dispose of the subjects where it first appears in the assignment of error.

FIRST ASSIGNMENT.

"The Court erred in sustaining the bill, and in adjudging thereon that the Defendant's ordinance of March 30th, 1901, was unconstitutional and void for any reason, and that the same should be perpetually enjoined, and Defendant taxed with any part of the costs of this cause. Said ordinance was not in conflict with any contract between the Plaintiff company and the Defendant, nor was schedule of rates therein prescribed unreasonable or confiscatory, or for any other reason illegal, unconstitutional and void."

This assignment goes to the whole case and calls for an examination of the law applicable to a case of this character, and makes it necessary to inquire whether or not the facts of the case, found by the Court and Master concurrently bring the case under the rule announced by this Court with respect to legislation, by act or ordinance, in violation of the 14th amendment. The rule applicable to a case of this character is now well settled by this Court, and is thus stated:

"What the Company is entitled to demand in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

San Diego Land & Town Co. vs. National City, 174 *U. S.,* 757.

The principle is also announced in this language:

"Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests of both the public and the owner of the property, together with all the circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of the property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

Covington & Lexington Turnpike Co. vs. Sanford, 164 *U. S.,* 578-597-598.

As said in a later case than either of the above:

"The main object of attack is the value of the plant.

It no longer is open to dispute that under the constitution, what the company is entitled to demand in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

San Diego L. & T. Co. vs. Jasper, 189 *U. S.* 442.

The language of this Court in the above cases would seem to be a conclusive answer to the contention of defendant presented in the court below with much earnestness, to the effect that the limit of complainant's right is to demand some compensation rather than "just" compensation measured by "fair return." For the proposition that some compensation is all that is necessary to be returned in rates, counsel has relied on the case of Railroad vs. Dey, 35 Fed. Rep. 866, an opinion by Justice Brewer, and upon Cotting vs. Goddard, 79 Fed. Rep. 684. The contention of counsel, however, may be said to be supported by the first case mentioned, so far as the literal language used is concerned, but the word "compensation" there referred to is stated by Judge Brewer to imply three things: "Payment of cost of services, interest on bonds and then some dividend. Costs of service implies skilled labor, the best appliances, keeping of road-bed, and the cars and machinery and other appliances in perfect order and repair." So that the "some compensation" referred to by Judge Brewer was some dividend in addition to the cost of service and interest on its bonded indebtedness. However, this view of Judge Brewer, as expressed in the Dey case, was expressly re-

tracted by the same Judge in the latter case of Ames vs. Union, &c., Railway, 64 Fed. Rep. 165. It was said in a later case by Mr. Justice McKenna:

"This is claimed to be established by authority. I do not think so. It seems to have been decided in Chicago Railway vs. Dey, 35 Fed. Rep. 165, but the same learned Judge who expressed that view in the Dey case, retracted it in Ames vs. Union, &c., Railroad Co., 64 Fed. Rep. 165, and it has received no judicial sanction since. This was inevitable since it came to be seen that the regulation of rates could not be an absolute legislative prerogative. When the power of judicial review was assured and entertained, the 14th amendment of the Constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative, that must apply justice as it is understood of men, and in its clear light it was inevitable that it would come to be seen that the 14th amendment of the Constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value—after its guarantees of the equal protection of the law to all persons, would be satisfied as to railroads, by leaving them a microscopical profit."

Southern Pacific Co. vs. Board Commissioners, 78 *Fed. Rep.* 261.

Likewise the other case of Cotting vs. Goddard, 79 Fed. Rep. 684, does not support defendant in its application to the facts of this case. It is said:

"But it seems to be clearly established by most recent interpretations of the Constitution, that legislation, which prevents a fair and reasonable return for capital engaged in legitimate business, is obnoxious to the Constitution."

It is said, however:

"It is not every public enterprise or investment, however unwisely undertaken or extravagantly maintained, that can claim a fair return on its property. The public have rights to be considered. If a company should build a railroad across the great desert of Sahara and carried but one passenger or one car of freight a day, it would be absurd to say that its rates should be fixed so as to make a fair return on the investment."

Cotting vs. Goddard, 79 *Fed. Rep.* 684.

The above case quotes approvingly from the opinion in the New Memphis Gas & Light Co. vs. City of Memphis, 72 Fed. 952, Judge Clark being the same Judge who tried and decided the case at bar:

"If the Company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the logical use of its property, and thus in substance and effect, of the property itself without due process of law and in violation of the Constitution of the United States, and in so far as it is thus deprived, while other persons are guaranteed to receive reasonable profits upon their invested

capital, the Company is deprived of the equal protection of the laws."

As applicable to the present case it may be admitted that if complainant company had built its present plant capable of supplying a city of the present population of Knoxville twenty years ago, when the town had a population of only 10,000, a rate could not have been maintained at that date sufficient to realize to it a fair return on its original investment, or upon its fair value as of said date, because such rate would have been entirely disproportionate to the value of the service rendered, and the investment at that time would have represented not a proper response to the public need of such service, but rather the folly of the original investors, just as the building of a railroad across the Sahara, as instanced in the above opinion, would not entitle the railroad to charge such rates to an occasional passenger as would realize a fair return upon the fair value of its property. Such was the view of this Court in Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 38; Covington, etc. vs. Sanford, 164 U. S. 578.

It has never been insisted in the case at bar that the service in itself is not worth the price charged, either with respect to the quality of the water furnished, or in any other respect, nor is it insisted that there is a larger investment or value in the property used for the public than the public uses require, so that this case, in its last analysis, depends simply upon the question, what was the fair and reasonable value of the Company's property devoted to the public service, when said ordinance was

passed undertaking to reduce its rates, and what would be a fair return on that value?

With respect to the date at which the fair value of the property of complainant devoted to the public service should be ascertained as a condition precedent to the ascertainment of what is a fair return thereon, it may be stated that no controvery has arisen in this case, so that said date was approximately March 30, 1901, the date of the passage of the ordinance attacked, though, as a matter of fact, the real date adopted was March 31, 1901, for the reason that March 31 was the close of the fiscal year of the Company, and both valuation and income could more readily be arrived at by assuming that as the date of the inquiry. To show that the above date is correct we refer to Sec. 1 of the reference requested by defendant, in which it is asked that the Master find whether or not defendant's said ordinance of March 30, 1901, was reasonable and would afford a reasonable income on the fair value of the Company's property actually being applied to public purposes at the date of the passage of said ordinance.

Printed Record, p. 117.

And we need only say further that no assignment of error is made in this Court controverting the proposition that the fair value of the property of complainant should be ascertained at the date when it was in fact ascertained in this case. The decisions of this Court likewise support this contention.

Smyth vs. Ames, 169 *U. S.* 466.

As said by this Court in the Sanford case, 164 U. S. 578, each case must depend upon its special facts, but as to the elements to be considered in the ascertainment of the fair value of the plant devoted to the public service, this Court has said:

"And in order to ascertain that value the original Cost of Construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original Cost of Construction, the probable earning capacity of the property under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in such case."

Smyth vs. Ames, 169 *U. S.* 547.

In this important case then it is suggested that the basis of calculation in a rates case is: "the fair value of the property being used for the public convenience," and that in ascertaining that fair value we may consider:

1. The original cost of the plant. 2. The cost of permanent improvements. 3. The amount of bonds. 4. The market value of bonds. 5. The amount of stock. 6. The market value of the stock. 7. Present Cost of Construction. 8. Earning capacity under the ordinance. 9. Operating expenses.

After mentioning these things the Court adds: "We do not say that there may not be other matters to be regarded."

We call attention also to the case of San Diego Land & Town Co. vs. National City, 174 U. S. 739, in which the opinion was by Mr. Justice Harlan, who said:

"The contention of the appellant in the present case is that in ascertaining what are just rates the Court should take into consideration the cost of the plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and the fair profit to the company over and above fixed charges for its services in supplying the water to consumers, either by way of interest or the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration and such weight be given them when rates are to be fixed, as under all the circumstances will be just to the company and to the public."

San Diego Land & Town Co. vs. National City, 174 *U. S.* 739.

In this opinion, referring to bonds of the company, the Court said:

"So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

174 *U. S.* 757-758.

The opinion last quoted from was delivered by Mr. Justice Harlan, who had delivered the opinion in Smyth vs. Ames, and it will be noticed that the considerations recited as entering into the question of reasonableness vary somewhat, although there is no inconsistency. Interest paid on money is specifically mentioned in the last case but not in the first; in the last it is said, in effect, that the company is entitled to a fair profit either by way of interest on the money it has expended or upon some other fair and equitable basis.

The question of valuation is covered by the 4th item in the Order of Reference in the following language:

"4th. The value of plaintiff's entire plant and property at the time of the passage of the ordinance of March 30, 1901."

Printed Record, p. 165.

In response to this inquiry the Master said:

"I find and report the value of the plaintiff's entire plant and property on March 31, 1901, to be as follows."

Printed Record, p. 171.

This statement is followed by details leading to a valuation of $608,427.95.

Printed Record, p. 171 *to* 175 *inclusive.*

We insist that if this finding of the Master as to the value of complainant's plant, as of the date of the passage

of said ordinance is supported by evidence in the case, then such finding, affirmed by the Court, as is the case here, is unassailable in this Court. We understand from the cases already quoted that it was the duty of the Master and of the trial judge to consider the following elements in arriving at a conclusion as to the value of the complainant's plant:

1. THE ORIGINAL COST OF THE PLANT.

In regard to this it is necessary to say, by way of premise, that it is admitted by both parties, though the fact is not mentioned in appellant's brief, but the contrary is intimated, that certain of the books of the Company have been destroyed by fire, and therefore, it became necessary to determine the original and proper cost by the testimony of witnesses familiar with the facts and thoroughly familiar with the plant in all its parts, and with the prices of material, etc., entering into said construction at the various stages thereof. The most important of these witnesses are William Wheeler and Frank C. Kimball. In the absence of sufficient data in the books by which it might be accurately determined as to what the cost of the plant, as it was being constructed, was, the experts in the case have adopted the only method by which they could reach a satisfactory conclusion with respect to the proper construction cost, and in this way they have taken the dates, as near as they could be arrived at, when the various parts of the plant were constructed, and from the knowledge of the witnesses as to the proper prices of such material and labor at those several dates, have reconstructed a proper cost of the plant, in all its

parts, according to the experience and best judgment of the witnesses, and in this way have arrived at a proper cost or what might otherwise be termed the investment value of the plant. The witness William Wheeler states the investment value at $853,655.41.

Printed Record, p. 388.

In this result the witness Frank C. Kimball concurs, adopting the same figures.

Printed Record, p. 814.

It appears from the record that the witness William Wheeler and the witness Frank C. Kimball jointly prepared the statement or analysis of the property from which these figures are taken.

Printed Record, p. 811.

The following experts of long experience and of the highest standing as construction engineers, approve the method adopted by William Wheeler and Frank C. Kimball in determining the investment value.

Witness J. L. Ludlow says:

"I think the method pursued in this analysis of Mr. Wheeler to be the most rational, direct and accurate way of determining the investment value of the plant. In fact, I think it is practically the only way that investment value could be determined."

Printed Record, p. 934.

The witness Arthur Hider also approved the method.

Printed Record, p. 983.

Witness T. T. Johnston says of the method adopted by Messrs. Wheeler and Kimball:

"It would be proper, because in my opinion it is the only way to arrive at a fair valuation of the plant."

He adds:

"It seems to me that it is the method of procedure that should be pursued in discovering what is a fair value of any construction, under general ruling conditions as to prices of labor, prices of material and various conditions that concern the making of a construction, and that that is the only way in which you can get at the fair valuation of a piece of property. It occurs to me it is fundamental; because a piece of property may be made cheaply under certain conditions, or expensive under other conditions."

Printed Record, p. 1007.

From an examination of the record it will be seen that Messrs. Wheeler and Kimball, in making the analysis referred to and so strongly approved by the three witnesses last quoted, took into consideration every item and article entering into the construction of the plant, fixing the valuation of every article as of the date when it entered into the plant, and this analysis covers pages 333 to 394 inclusive of the Printed Record.

Upon the facts just stated we submit that, not only is there testimony in the record to support the cost of construction as stated, but that there is no substantial testimony anywhere to controvert it.

In this connection we call attention to the qualification of the several persons who testify as experts in this cause, and submit that the City's, so called, expert witnesses do not, under the established rules upon the subject of opinion evidence, entitle themselves to testify as expert or opinion witnesses. The "expert" principally relied upon by the City is William Nixon, who in the opening of his testimony in chief states his qualifications as follows:

"I first started out in life as a shipping clerk—a steam boat clerk, then into the wholesale grocery business as bookeeper, wholesale grain business, iron ore mining business, then United States Marshal during Cleveland's first term, and then mining and iron manufacturing business, then I was income tax collector for a few months for the Government for East Tennessee, then I was appointed Prison Commissioner for the state of Tennessee in 1895 and was engaged for six years in the building of the new Penitentiary for the State, and in the opening of the mines, equipment and operation of the same and the taking over the convict system of the State and arranging systems of accounts, bookkeeping and reports and methods of handling, keeping and reporting the business of that institution. The last two or three years I was General Manager for the Cumberland Coal and Coke Company, engaged in the opening and equipment of

mines, and to some extent the systematizing of the accounts and records of that company."

Printed Record, pp. 1304-1305.

These vocations of the witness are very various, and indicate considerable versatility, but it will be difficult to find from them a reason for allowing Mr. Nixon to testify as an expert witness in water works construction and valuation. The periods of his service in the several capacities to which he has referred appear to be as follows, to wit: Steam boat clerk, one year; clerk in a wholesale grocery house, one year; partner in a wholesale grocery business, four years, dealer in grain about ten years; United States Marshal, two years; iron ore mining, five years; income tax collector, three months; Prison Commissioner, six years.

Printed Record, pp. 1400-1401.

Mr. Charles S. Brown, the other expert witness for the City, is a mechanical engineer and professor of mechanical engineering in Vanderbilt University at Nashville, Tennessee. In his testimony in chief he states his qualifications as follows:

"My engineering education began previous to entering college, in the machine shops, where I learned the trade of machinist. I then entered Yale University in the Sheffield Scientific School, and graduated from that institution in 1883, after taking a course in mechanical engineering, with special work in mining engineering.

with the idea of qualifying as a mining engineer. I then began work in my profession as a mechanical mining engineer, or mill engineer more particularly, and was engaged for three or four years in mining mill buildings, in which time I put up several very large plants in various parts of the country. I then went into cable railroad engineering in Kansas City, and during that time designed, besides special appliances for cable railroad construction and details, several large power plants for the several lines that were under construction at that time in Kansas City and St. Louis."

*Printed Record, pp.*1835-1836.

After this he managed a coal mining property in Indiana; then became professor of steam engineering, etc., at a school in Indiana; then became a consulting engineer; went to Nashville in 1896 as Professor of mechanical engineering; has had a consulting practice in the South in designing and supervising the construction of water works, sewerage, filtration plants, electric light and power stations, etc; was consulting engineer for the Board of Prison Commissioners while the witness Nixon was Chairman, and designed the water works for the new penitentiary; has designed a municipal electric light plant for Nashville recently, and at the time of testifying was engaged as consulting engineer for a company of Nashville contractors in the construction of water works and sewerage at Chickamauga Park, Georgia.

Printed Record, pp. 1835-1836.

It will be seen that in the above statement reference was made to the designing of a water works system by this witness. On cross-examination he was asked the following questions:

"Q. Mr. Brown, where did you ever build any water works?

A. My only experience in the actual construction of water works is at the Prison in Nashville.

Q. What was the extent of the system there?

A. The system consisted of an electrically operated pump driven from the power station of the Prison; a pneumatic system of pumping also operated from a compressor at the power station, a pair of settling reservoirs, a storage reservoir, a filter plant and the connecting pipe lines."

Printed Record, p. 1865.

"Q. Have you designed a system of water works anywhere else?

A. Yes sir, I have designed two other systems; one for Morrillton, Arkansas, and the other for Dickson, Tennessee.

Q. How big a town is Morrillton?

A. About 2500, I think.

Q. And how big a town is Dickson?

A. About the same.

Q. Did you estimate the cost of those systems in advance?

A. I made estimates of cost, yes sir.

Q. Were the systems built?

A. They were not."

Printed Record, p. 1865.

Asked if he had ever given testimony in a water rates valuation case, he answered no.

Printed Record, p. 1865.

If Mr. Brown is entitled to be treated as an expert witness it is nevertheless reasonably certain that he is only moderately expert.

Upon the other hand the qualifications of the expert witnesses for the complainant, the Water Company, are indisputable and of the highest order.

The President of the Company, Mr. William Wheeler, has been engaged in designing and constructing works since 1873, and has designed and constructed such works at Concord, Massachusetts; Canton, Massachusetts; Somerworth, New Hampshire; Belfast, Maine; Exeter and Derry, New Hampshire; Watertown, Massachusetts; Cottage City, Massachusetts; Baintree, Massachusetts; Putnam, Connecticut; Danielson, Connecticut; Stonington and Groton, Connecticut; Portland, Connecticut; Palatka, Florida; Paris, Kentucky; Winchester, Kentucky; upon the extension of works at Ashland, Wisconsin; and the water works and irrigation works of the Lewiston Water & Power Co., in the state of Washington.

It appears also that Mr. Wheeler has been engaged in the management of water works at a large number of the places mentioned above.

Printed Record, pp. 322-323.

Frank C. Kimball, manager of the complainant's plant for a good part of his life, has been engaged since 1885 almost continuously in constructing and operating water works. He has had charge, in whole or in part, of building works at Belfast, Maine; Somersworth and Exeter, New Hampshire; Baintree and Cottage City, Massachusetts; Putnam, Danielson, Stonington, Mystic and Portland, Connecticut; and Paris and Winchester, Kentucky; and at Knoxville, Tennessee.

Printed Record, p. 803.

J. L. Ludlow, expert witness for the Water Company, has been engaged continuously in this line of work since 1885. He has been connected with water works at Raleigh, North Carolina; Charlotte and Goldsboro, North Carolina; and has designed and constructed or been connected with the construction of water works at Rocky Mount, Wilson, Tarboro and Statesville, North Carolina; at Huntsville, Alabama; and Eufala, Alabama; at Columbus, Mississippi; and Charleston, South Carolina.

Printed Record, p. 931.

Arthur Hider, another expert witness for the Water Company, has had charge of sewer construction, streets,

bridges, railroad connections, etc., in the city of Louisville, Kentucky, and has done work in connection with the plant of the Louisville, Kentucky, Water Company; was one of a committee of three engineers to value the water plant at Memphis, Tennessee, which committee made a report which was accepted by the city authorities and resulted in the purchase of the water plant by the city at a valuation of over $2,000,000. At the time of testifying this witness was employed by the United States Government as principal assistant engineer in charge of 220 miles of river improvements upon the Mississippi river.

Printed Record, pp. 981-982.

T. T. Johntson, expert witness for the Water Company, had his first experience in the purchase of a water supply at Joliet, Illinois, in 1888; was engineer for the water supply of Memphis and designed the system which now serves that city; designed the works which now supply the city of Savannah, Georgia, and supervised the construction of the same; has been employed in connection with water works litigation and construction at Rockford, Illinois; Racine, Wisconsin; Greenville, Mississippi; and Waco, Texas; was connected with the Chicago Drainage Canal, and designed important parts of the construction of it. At the time of testifying he was connected with the American Falls Power Company, of Idaho, with development of a water power plant at Marseilles, Illinois, and of another at Wilmington, and was employed by the state of Illinois in the matter of a pumping station for feeding the Summit Level on the Illinois and Mich-

igan canal. At the same time he had charge of the water supply at Memphis.

Printed Record, p. 1005.

Perhaps even better qualified than any of these witnesses is the Water Company's expert, Nesbit Wingfield. It appears that this witness has been in constant engineering practice for twenty-three years; that he planned and constructed complete water works plants at Chattanooga, Tennessee; Lookout Mountain, Tennessee; Meridian, Mississsippi; Forsyth, Georgia; Augusta, Georgia; Greenwood, South Carolina; Algiers, Louisiana; and North Augusta, South Carolina; has planned and constructed additions to water works plants at New Orleans, Louisiana; Summerville, Georgia; Rome, Georgia, and Little Rock, Arkansas; has made complete plans and specifications for works at Bay St. Louis, Mississippi; Greenville, Mississippi; Cleveland, Tennessee; Montgomery, Alabama; Canton, Mississippi, etc; has made estimates of valuation of existing plants at Lexington, Kentucky; Birmingham, Alabama; Montgomery, Alabama; Macon, Georgia; Washington, Georgia; Clarksville, Tennessee; Knoxville, Tennessee; Norfolk, Virginia; Suffolk, Virginia; Memphis, Tennessee; Portsmouth, Virginia; and Berkley, Virginia. He has had actual experience in the operation of plants at Chattanooga, Tennessee; Augusta, Georgia; Meridian, Mississippi; and Little Rock, Arkansas; has had actual experience in filtering the waters of the Tennessee, Coosa, Arkansas, Savannah, Cumberland, and Ocomulgee rivers, etc.

Printed Record, pp. 1949-1950.

From this statement of the qualifications of the expert witnesses which we have thought it best to set out in some detail, we submit that in so far as expert testimony is to be given any effect in this case, the overwhelming weight of such testimony is upon the part of the Water Company, and we repeat our proposition that the City's witness, William Nixon, is not entitled, in any respect, or to any extent, to be called an expert for the purposes of this case; and that the witness Charles S. Brown, for the City, if an expert at all, is one of a most inconsiderable extent.

In regard to the experts the Master's statement and comparison will be found on page 166 of the printed record, and his conclusion is in the following words:

"The Master must rely largely upon the cross-examination of the witnesses, and in this test the expert knowledge of complainant's witnesses gives them superiority, not, however, to be exaggerated to the exclusion of any material facts."

Printed Record, p. 167.

2. THE AMOUNT OF BONDS.

Before passing the ordinance of March 30, 1901, the Board of Mayor and Aldemen of the City of Knoxville, by an ordinance passed in pursuance of a contract with the Water Company, expressly released the Water Company from a contract provision theretofore existing, lim-

iting its bond issue to $150,000, without fixing a new limit, but providing that not more than $800,000 of bonds should be issued prior to the 1st day of January, 1901, and further that no bonds in excess of $800,000 should be issued except to provide funds for additions to or improvements of the plant of the Water Company.

Printed Record, p. 62.

We assume that the bonds issued by the Company should be considered in arriving at a valuation, because they are supposed to represent the indebtedness of the Company legitimately incurred for the construction and the improvement of the plant. It seems to be clear, therefore, that any indebtedness of the Company of the kinds usually represented by bonds ought to be considered and given the same effect, if in actual existence, though not funded into bonds. On March 30, 1901, the Knoxville Water Company was indebted as follows:

First Mortgage Bonds	$150,000.00
Debenture Certificates	85,000.00
Capital Stock, Preferred	295,000.00
Notes Payable	251,500.00
Elbert Wheeler, Treasurer	43,000.00
Accounts Payable	44.74
Making an aggregate of	$824,544.74

All these items were bearing interest except the account for $44.74.

Printed Record, p. 721.

That the preferred stock was intended to be, and actually was, a substitution for an equivalent amount of bonds, and that it was an interest bearing obligation of the Water Company created for the sole reason that the appellant in this cause refused to allow the Water Company to issue bonds to make the necessary improvements and extensions, fully appears from the testimony of William Wheeler.

Printed Record, pp. 705-707.

3. THE AMOUNT OF COMMON STOCK.

The amount of common stock outstanding March 30, 1901, was $645,000.

Printed Record, p. 720.

4. EARNING CAPACITY.

The earning capacity of the plant, that is, gross income, March 30, 1901, was $88,481.39.

Printed Record, p. 714.

5. OPERATING EXPENSES.

The operating expenses, March 30, 1901, amounted to $35,775.89.

Printed Record, p. 715.

Both the earning capacity and the operating expenses here stated relate to the entire plant.

6. COST OF REPLACEMENT.

The two experts, J. L. Ludlow and Nesbit Wingfield, testify to a joint calculation of replacement value as of March 31, 1901, of $618,100.24.

Printed Record, pp. 1954-1961, *inclusive.*

It appears that, as to all the material elements which it was proper for the Master to consider in making his report, there is abundant evidence to support his findings of fact, that the fair value of this plant was the sum fixed by him, to wit: $608,427.95, and if the evidence which we have cited above on which the Court has made a valuation, constitutes some evidence in support of the finding of the Master as to the value, this finding, confirmed by the Circuit Judge, must, under the rulings of this Court, be unassailable.

Logically, having found the fair value of the property of complainant as of the date of the passage of the ordinance March 30, 1901, we should include in the discussion of the first assignment of error the specific assignments with respect to the action of the Master in allowing certain elements as part of the value and of fair return; but these specific assignments are made under various sub-divisions under assignment No. 8, so that we

digress at this point in order to notice the assignment between numbers I and VIII.

SECOND ASSIGNMENT.

This assignment raises the question that the Court erred "in over-ruling the defendant's petition to rehear. The several grounds therein set out, each and all afford good and sufficient reasons for the rehearing of this cause and dismissal of plaintiff's bill. The said grounds for rehearing are fully set out in the petition, which is hereby referred to, and incorporated herein and made part hereof in as full and ample a manner as if specifically copied and set out herein." This assignment is manifestly bad, as it points out no specific error but refers the Court to a voluminous petition, somewhere in the record, which petition embraces in all of its substance the specific assignments of error thereafter made in the Circuit Court. Therefore if this assignment of error should be treated as a sufficient one, under it alone would be opened up all the questions in the case, and that this should not be the effect of such general assignment is manifest from an examination of the rules of this Court. For that reason we make no further reference to this second assignment.

THIRD ASSIGNMENT.

This assignment raises the question that the Master should have looked to and reported upon the value of the

plant, income and operating expenses subsequent to the passage of the ordinance of March 30, 1901, and says that the Court was in error in dismissing defendant's petition to rehear the question to a special master to ascertain whether with reference to these matters subsequent to the passage of said ordinance, complainant would have received a fair return.

The question made by this assignment is subsequently raised in the ninth assignment, more specifically, and we therefore defer discussion of the third assignment until the ninth and more detailed assignment is reached.

FOURTH AND FIFTH ASSIGNMENTS.

These assignments raise, practically, the same question—that the Court erred in making any reference whatever of this cause to a special master, at the time the same was made, and in the matter and manner of the reference made. These two assignments of error have been replied to by us in giving a history of the case, and by showing that the reference was made without any exception and, in effect, by consent.

SIXTH ASSIGNMENT.

This assignment is directed to the action of the Court in sustaining Plaintiff's exceptions to the Master's report, especially that one with reference to the allowance

of blind services on the part of the value of the plant. This assignment is likewise raised under sub-division "c" of Assignment VIII, so far as blind services are concerned, and no other exception of plaintiff was sustained.

SEVENTH ASSIGNMENT.

This is a general statement of error in the action of the Court for overruling defendant's voluminous exceptions to the Master's report, without setting out any of them, when all of them that are material, are made in subsequent assignments of error and are treated by us.

EIGHTH ASSIGNMENT.

This assignment probably should be treated as directly related to Assignment No. 1, and growing up under it, in as much as said assignment presents, specifically, a claim of error entering into the Special Master's report and finding as to the fair value of Complainant's plant as of date March 31, 1901. The first error assigned under general Assignment VIII., is that the Court erred, as follows: (a) In adopting the Special Master's basis of cost of reconstruction of an entirely new plant as the value of the existing plant which had been in existence and use for more than twenty years. This assignment of error is based upon an entire misapprehension of the Master's finding. The Master does not adopt as the basis for his finding of the value

of the existing plant the cost of reconstruction of an entirely new plant as assumed by said assignment of error. It is true the Master in setting out the details by which the value is made up, adopts many of the figures used by the witnesses Wingfield and Ludlow in their replacement estimate. But the Master did not adopt the replacement estimate as the criterion or basis of his determination of the true value, but as stated by him in his report, found the true value from consideration of all the elements entering into the valuation of the plant, including the replacement value as one element, and this actual finding of the Master must be held to refute the assumption of appellant that he adopted as his basis the cost of reconstruction. On the contrary the Court will look, in opposition to appellant's contention, to the fact that the Master has reported the actual value of the property and not the replacement value, at the sum by him fixed. Appellant, however, insists that because Mr. William Wheeler estimates, in his statement of investment values or proper cost of the plant, the incomplete depreciation at about $77,000, therefore the finding of the Master as to the value of the plant, as of date March 30, 1901, should be reduced by the amount of the assumption as to incomplete depreciation, incomplete depreciation in this record, meaning that depreciation of the physical plant resulting from its use, but such parts of the plant so used and depreciated being still component parts of the physical plant. Therefore defendant makes an erroneous application of the testimony of Mr. William Wheeler. The Court will see, from the statement of value amounting to large sums in the Master's

report, such as rock and in some cases earth excavation, etc., that no depreciation can be represented in these items, even using the figures of Wingfield as to the replacement value thereof, it being manifest that where rock and earth excavation and matters of that kind have been accomplished, in construction, the work is in its nature permanent, and in such case replacement value will in fact represent the true value of such construction. It will be remembered that Mr. William Wheeler makes no computation or estimate of the fair value of the property, as of date March 30, 1901, therefore his statement as to incomplete depreciation in the plant is relative to his statement as to proper cost of construction as in fact accomplished, and of course, being on a basis of $853,000 in round numbers, if his figures had been reduced to the fair value found by the Master there would be a much less sum referable to incomplete depreciation than the sum of $77,000, and therefore, the amount of $77,000 used by Complainant as an item to be deducted from the Master's finding as to true value is erroneous in its assumption that there is any proof in the record from which it may be argued that there is $77,000 of incomplete depreciation in the fair value of the plant found by the Master, as of date March 30, 1901; and however this fact may be, we think it will be manifest to the Court that incomplete depreciation or some degree of impairment of value of the plant is a necessity incident to its age and operation. In this case not only is there incomplete depreciation, but in the operation of this plant there necessarily occurred what is known as complete depreciation, or such removal of machinery adequate and proper for the needs of the city when placed in construction, but

which, with the growth of the city and the increased uses of water, became obsolete and were removed entirely from the physical plant. All this class of depreciation, being a necessity incident to the operation of a water plant when such plant is to valued at a given date, it certainly should be considered that the plant has gone through this strain of depreciation, and having survived it and being in operation, a certain value thereby has been added to the entire physical structure. In valuing one particular part of the plant, as separate from the entire structure it might be said that with incomplete depreciation there was some loss of value in that particular part, but when valuing a structure as a whole, as must be done in this case, there must be less reduction of the value of the entire plant. The reduction must be less than the entire amount of incomplete depreciation, and the value must be something at least in addition to the aggregate valuation of the single items of that plant separate from their position in the system. This was Judge Clark's view in this case, and in speaking of this depreciation he uses this language:

"So that according to the contention of the City by its able counsel, this company is under the necessity, as towards the city, of losing absolutely and finally the culminated depreciation down to the time of the ordinance, by its deduction from the otherwise reasonable value of the plant, and that it is not entitled to a rate of income which will afford any compensation in the way of a sinking fund, or a depreciation fund, or interest on the lost capital which would represent this depreciation; in other words that the company is not entitled to be reim-

bursed for this loss in the form of repayment of the loss, or of an income on the sum which represents this loss.

If this position is sound it seems to me too manifest to require argument that such a doctrine leads to results that are already unjust and inequitable, and if any principle can be found on which this Water Company, by reason of its relation to the City, is under obligation to sustain this large loss, with no form of repayment of the capital, and without its at all adding to the value of the plant, and without any return on the same in the form of a dividend or a rate of charge, I am not aware of such principle, and after a most careful study of this point I am unable to perceive grounds on which such a proposition can rest and command approval." * * * "Now, does this Water Company sustain any such relation toward the City, and is its ownership of this plant and its operation subject to any just or legal demand on the part of the City that it shall permit this large loss?" * * "If this is capital lost necessarily, and if the age and growth of the company, when such losses must be sustained has been passed, does it not add to the value of the plant and property that it has gone through this hazardous and experimental evolution? To the extent that these losses have been sustained they will not be sustained again, but only new losses in the form of future growth of the City and population, which it was the purpose of this plant to serve and supply. It must be that the evolution through so disadvantageous a stage must add something to the value of what is left. If this is not so we have a striking lesson of the disadvantage of an investment of capital in this form, as contrasted with its investment in

safer forms, with entire freedom from care and anxiety, and from depreciation of capital and from constant attention and energy to prevent such depreciation and secure a reasonable return."

Printed Record, pp. 303-304.

Therefore, we most earnestly insist that, the Master having found upon the evidence in this record, a part of which we have brought to the attention of the Court, that the fair value of this plant, as of date March 30, 1901, was in round numbers, $608,000, and this finding having been confirmed by the Circuit Court, this Court should not disturb that finding.

Sub-section b, Assignment 8, is as follows:

"In estimating or confirming the estimate of the Special Master as a part of the value of the plant upon which a fair return should be made to this Company, such parts or incidents thereof as were contributed or donated to the Company by the public or the City, to wit: services put in at the cost of consumers, about $35,000 to $40,000.00 and 'going concern' or good will $60,000.00 arising from the generous patronage of the Company by the public."

Printed Record, p. 325.

This assignment divides itself into two parts: 1st, as to the allowance to the Water Company of the fair value of such part of the plant as is claimed to have been

donated to the Company by the public, this having reference to the question of services. The assignment itself admits on its face that the services referred to are such "as were contributed or donated to the Company by the public or the City," which admission is in acordance with the facts proven in the record.

Testimony of William Wheeler, Printed Record, pp. 2152-2153.

While we might content ourselves with the admission of counsel in said assignment of error that these services are now, or were at the date of the passage of the ordinance, the property of the Company, yet counsel is inaccurate in saying that the title to these services is derived from contribution or donation of the public exclusively, although the question is immaterial as we insist, in this case, as to how the Company acquired the right and title to the property. Mr. William Wheeler states in his testimony, which is uncontradicted:

"As a matter of fact very many, perhaps a large majority or nearly all of these original services laid in that manner have since been renewed by the Company and at its sole expense."

Printed Record, p. 2153.

So that the exception above referred to is answered by the reply to the question whether or not property acquired by gift or otherwise, by a corporation can be taken away either by way of reduction of rates or condemna-

tion, except after the payment of just compensation. This question is answered in favor of the Water Co., by the decision of this Court in the case of Monongahela Navigation Co., vs. U. S., 148 U. S. 312. In this case it appeared that condemnation proceedings had been brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, under an Act of Congress providing for the condemnation of a lock and dam in the Monongahela River. It was provided in the Act of Congress, that, in estimating the sum to be paid by the United States, the franchise of the said corporation to collect tolls should not be considered or estimated. Upon the trial in the Circuit Court, evidence of the value of the franchise was rejected. This Court in considering the correctness of this rule, said:

"The power to regulate commerce is not given in any broader terms than to establish post-offices and post-roads, but if Congress wishes to take private property upon which to build a post-office, it must either agree upon a price with the owner, or in condemnation, pay just compensation therefor, and if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made, and that which is true in respect to a condemnation of

property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvements of a navigable stream, it was deemed essential to construct a canal and lock in order to pass around a rapids or falls; of the power of Congress to condemn whatever land may be necessary for such canal there can be no question, and of the equal necessity of paying full compensation for all the private property taken, there can be as little doubt. If a man's house must be taken, that must be paid for, and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for because it is a substantial element in the value of the property taken; but coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the Constitutional limitation of just compensation. The theory of the Government seems to be that the right of the navigation company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there and the franchise to take tolls, but this is a misconception; the franchise is a vested right—the State has power to grant it—it may retake it as it may take other private property for public uses, upon the payment of just compensation. A like, though a superior power, exists in the National Government. It may take it for public purposes, and take it even against the will of the State, but it can no more take the franchise which the State has given than

it can any private property belonging to an individual."

This was the view also of the Circuit Judge in the case of the Spring Valley Waterworks vs. City of San Francisco, 124 Fed. 574, a rates case, in which it was said:

"It is true this was a condemnation proceeding, and the question was to determine what was just compensation for the appropriation of corporate property to a public use, while the case before this Court relates to the fixing of water rates which shall be a just compensation for the appropriation of complainant's property to a public use. It is not perceived that there is any difference in the principles applicable to the two cases, and this appears in the view of the Supreme Court in the case of San Diego Water Co. vs. San Diego, supra."

We submit that this must necessarily be the rule, in a rates case as in a condemnation case, because the source of the title of the property owned by a public service corporation is not material. It can make no difference whether it is derived by purchase out of the income or by contributions of its stockholders, or is given direct by the public to the company. It is manifest that a public service corporation derives all of its property, except that contributed by its stockholders, from the public, and whether this is so derived from income directly contributed by the public, by way of rates or otherwise contributed by the public in consideration of service rendered, is immaterial. It is the public's contribution in either case, and if for value, as in this case, it only makes the equity stronger.

The second point made by appellant under paragraph (b) of the 8th assignment of error,

Printed Record, p. 235,

is that the Master and the Court below were in error in allowing for what is termed "Going Concern or good will" to the extent of $60,000. It does not appear to be contended that the allowance of $60,000 is in excess of what the proof shows to be the fair value of the "Going Concern," or disputed that "Going Concern" has a value, and to this extent enhances the fair value of the plant as a whole. These conclusions cannot be disputed from the testimony in this case. Mr. William Wheeler, in his testimony, says:

"The consideration of the value of what is known as going concern, consists of the difference in value and the difference in cost between a plant that had attained to an established business and identically the same kind of a plant in the same place that has just been completed and has yet to build up its business. That value consists chiefly in the fact that the owner of the plant with the going value starts out at once with an income affording a return upon the capital invested in it, while the owner of the plant which is at the beginning of its operation has not that return—has a business that is small at the beginning and increases rapidly. The going value of the established plant consists very largely of the excess of its net income during a certain period with the business established above the income which would be obtained during the same period upon starting anew in the

business. Or in other words, it is substantially equivalent to a deficiency account—to a summation of the deficiency of earnings in the first years of business to provide for a fair return on the capital invested therein. It is in a sense comparable with the allowance of interest during the year of construction before the plant is ready to operate. I consider 15 per cent of the construction cost a conservative valuation of the going concern. It is also a conservative valuation or summation of the arrears of interest which such a property would afford during the period of the development of its business to provide a fair return upon the capital invested therein. That is, upon the assumption, of course, that the investors are to have rates such as to provide a fair return upon the capital from the inception of the enterprise onward. This allowance of 15 per cent is based upon my analysis and experience of numerous other water plants in going through the period of business development. I have also compared it with the awards and findings that have been made by agreement and by arbitration, and it is within the average results of such findings or agreements, as well as of the conclusions which I draw from experience in the cases to which I referred."

Dep. William Wheeler, Printed Record, pp. 398-399.

It will be noticed that in this statement of the principle or rule of "going concern," Mr. Wheeler relies upon observation and experience, and from these deduces the general rule that 15 per cent of the construction cost is a fair allowance on this account. As it is apparent

that there is a logical connection between income and going value, when Mr. Wheeler was recalled he was asked:

"Q. What, if any, relation has the going value to the income of a plant like this?

A. I think it has a very direct relation to the income as of the time when the "going concern" is to be valued—a necessary relation."

Dep. William Wheeler, Printed Record, p. 2137.

He further said:

"Q. Have you made a computation and statement of the value of the "going concern" in this case as related to the income of the Company?

A. I have.

Q. If so, I will ask you to state in detail?

A. I will first state that my statement and estimate is based as directly as I am now able to base it, upon my understanding of the nature of the element of "going concern" as judicially determined in other cases; that is, that in effect it is the value of an established business as a component part of the property; that is to say, of a water works property as compared with a similar or identical property, conceived to be situated in the same place, considered as of the same time, that has no business, but that is in a position to begin to acquire a business; it would therefore, it seems to me, consist directly of any excess of income above operating expenses, which

the plant with its business already established, say this plant as of March 31, 1901, would have, beginning at that time and from that time onward, above the income of an identical plant, or assumptive plant if you please, which at that time is starting with no business, but which has its business yet to acquire, it being assumed however that such plants are not to be considered in competition, but that each is occupying the field independent of the other, one with the business and the other without the business at the time of starting."

Dep. William Wheeler, Printed Record, p. 2138.

Mr. Wheeler then inserts in his deposition a table entitled "Estimate of 'Going Value' or 'Going Concern,' March 31, 1901," with the result of fixing the value of going concern in this case at $133,338 or 18.74 per cent of the estimated construction cost.

Dep. William Wheeler, Printed Record, p. 2139.

His former estimate of 15 per cent determined the going value at $106,706.92.

Dep. William Wheeler, Printed Record, p. 388.

A comparison of these two results, the one based upon observation, to wit: 15 per cent, and the other upon a mathematical calculation related to income, dem-

onstrates the general accuracy of both methods, and more particularly proves that the first estimate of 15 per cent was too small. Each method, however, supports the other, although it is obvious that the calculation based upon income is the more logical and satisfactory of the two. The adoption of the second method would increase the total cost of the physical property, as set out in the analysis, from $853,000 to about $880,000, and would proportionally increase all allowances and calculations hereafter referred to, and based upon this amount of $853,655.41.

The ground on which counsel for appellant insists that "going concern," though admitted to be an element of value, should not be allowed in a case of this character, is that the public has made the value of "going concern," and even if this contention of fact be correct, and it is not admitted that it is correct in the sense in which the claim is made, still the principle of the Monongahela case, supra, is decisive of this contention against appellant, and the question before this Court is, finally, whether or not the value of "going concern," where it exists as a part of the value of the plant, as a matter of law, should be disregarded. The Master has not followed the proof as to the amount of the value of the "going concern," but has reduced the same from a value fixed at more than $100,000 in the testimony, to the sum of $60,000. Many cases are found wherein the principle of going concern is discussed and allowances made therefor. In the case of National Waterworks Co. vs. Kansas City, 62 Fed. Rep. 853, Mr. Justice Brewer said:

"A completed system of waterworks, such as the Company has, without a single connection between the

pipes and the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, not only with the capacity to supply the city, but actually supplying many buildings in the city—not only with the capacity to earn, but actually earning—makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."

62 *Fed. Rep.* 865.

The above quotation is incorporated in the opinion by Judge Morrow in the case of Spring Valley Waterworks vs. The City, etc., of San Francisco, 124 Fed. 574, and is there adopted and approved.

The principle is also approved in the case of Kenebec Water District vs. the City of Waterville, et al., 96 Maine 185, 60 L. R. A. 856. See also Newburyport Water Co. vs. Newburyport (168 Mass.) 47 Northeastern Rep. 533, and Brunswick & Topsham Water District vs. Maine Water Co., 99 Maine 371.

It was insisted by Defendant that the value of the "going concern" "should not be based upon the value of the plant at the end of twenty years of its business, but upon the value of the initial plant. Other portions of the plant are mere replacements of part of the plant, having already become 'going concern' or additions or extensions of an existing plant and 'going concern' made in compliance with an existing public demand."

Our insistence is that what the Court is called on to determine in this case is the value of complainant's plant as of the date of the pasage of the ordinance, March 30, 1901, and as the going concern was a part of that value at that time, the same must necessarily be valued as of that date. It is not the going concern estimated upon the value of the plant twenty years ago, as it then existed, but the going concern of Plaintiff's plant as it was March 30, 1901. Defendant's contention seems to be that the going concern of a plant which might be valued at $500,000 or $600,000 March 31, 1901, and earning $85,000, is the same as the value of the going concern of a plant valued at $125,000 and earning $25,000. What we are entitled to is the value of the going concern for Plaintiff's plant, as of date March 31, 1901, and not the value of going concern of any earlier or different plant, and it is manifest that this is the only true and logical method of arriving at the value of the going concern of this particular plant, and is the method by which Mr. William Wheeler arrives at that value, and this certainly is the view which Mr. Justice Brewer had, as presented in the case of National Waterworks Co. vs. Kansas City, 62 Fed. Rep. 853, in which he said:

"A complete system of waterworks such as the company has" (not had) "without a single connection between the pipes and the streets and the buildings of the city, would be a property of much less value than that system connected as it is" (not was) "with so many buildings and earnings, in consequence thereof, the money which it does" (not did). "Again the fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings

in the city, not only with a capacity to earn, but actually earning, makes it true that the fair and equitable value is something in excess of the cost of reproduction."

From this statement it is manifest that the Court meant that the going concern must be calculated with respect to the plant as it was at the date of the inquiry, and in this way it has been handled by the Master and by the Court herein.

In this case the Master, on the value of the plant, exclusive of the value of the going concern, has allowed about 11 per cent.

The results reached, and the discussion of the method of reaching the same, in other well considered cases, are of importance in the consideration of going value as related to the physical plant in this case. A well considered case upon that question is the case of Newburyport Water Co. vs. Newburyport, supra, 168 Mass., 541, the opinion in which case was delivered by Chief Justice Holmes, now a member of this Court.

The fair value of the property for the purposes of its use by the city upon Jan. 29, 1895, was $275,000, with interest, Id. Id. p. 546. The Act under which the Newburyport Water Company's plant was valued prescribed that the value of the plant "shall not be enhanced on account of the future earning capacity or good will, or of the franchise of the company." Id. Id. 544. The report of the commissioners therein, at Sec. 7 thereof, states:

"We further find that the plant was a going concern and in full operation at the time of the transfer—one

that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic use and municipal purposes (including in the latter hydrant service)—and upon an examination of these facts are of opinion that the property had a greater value for the purpose of its use by the city by reason thereof, than if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant. This enhancement we have fixed upon as adding to the value of the property the sum of $40,000. In passing upon the same, we have not made the income derived from the business its element or basis, or any other factor than that above stated."

Id. Id., 545.

With respect to this phase of the case, the Supreme Court of Massachusetts, speaking through Chief Justice Holmes, says:

"The commissioners state the elements of valuation which they have taken into account. In addition to the value of the tangible property and easements, they have allowed forty thousand dollars for the fact that the plant was a going concern and in full operation. They have allowed for everything for which the petitioner was entitled to be paid. They have approached the question in a manner in which it was within their discretion to approach it. National Waterworks Co. vs. Kansas City, 62 Fed. Rep. 853."

Id. Id. 555.

The comimssioners award was accepted by the Court.

Id. Id. 556.

So that this well considered case was authority for the allowance of going concern, and the ratio of going value to the value of the physical plant, in said case, was 17 per cent, or that proportion which $40,000 bears to $235,000, and it will also be noted that in the case above referred to, the commissioners were expressly prevented from valuing good will in its relation to profits or the value of the franchise.

Another instructive Massachusetts case was that of the Gloucester Water Supply Co. vs. Gloucester, 179 Mass. 365, in which case the value of the going concern was fixed at $75,000,

Id. Id. 380,

and the valuation allowed for physical plant, not including a special value of water in excess of construction cost, $380,500; thus the proportion of the value of going concern to the valuation of the physical plant was 19.7 per cent. If the special value of water in excess of value of the land and reservoir be included in said case, the award of the physical plant, plus water, was $600,500, and the ratio of such going concern to such total physical value was 12.5 per cent, and in treating of said question of going concern, it is said in this case:

"The only doubt as to the propriety of the allowance of a sum in addition to the cost of duplication, less de-

preciation, of the water company's plant is whether the principles on which the commissioners proceeded were sufficiently favorable to the water company.

It is plain that the real, commercial, market value of the property of the water company is, or may be, in fact, greater than 'the cost of duplication, less depreciation, of the different features of the physical plant.' Take, for example, a manufacturing plant: Suppose a manufacturing plant has been established for some ten years and is doing a good business and is sold as a going concern; it will sell for more on the market than a similar plant reproduced physically would sell for immediately on its completion, before it had acquired any business."

"We think it is plain that there is nothing in the provisions of Sec. 16 of the act in question, St. 1895 c. 451, forbidding the comissioners considering this element of value which, as we have seen, in fact exists. The provisions of the act are that the 'fair value * * shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.' Whether that would allow present earning capacity and present good will, apart from the franchise, to be taker into account, as distinguished from future earning capacity and future good will, need not be considered. It is plain that the element of value, which comes from the fact that the property is sold as a going concern, in which case it has, or may have, in fact, a greater market value than the same property reproduced in its physical features, is not excluded from consideration by that provision of the statute."

Id. Id. pp. 382-383.

With certain modifications, immaterial to be considered, the report of commissioners was confirmed in said cases, with the result that upon the actual physical value a percentage of going concern was allowed, amounting to 19.7 per cent.

In the leading case upon this question a decision by the Circuit Court of Appeals, in an opinion by Mr. Justice Brewer, in the case of National Waterworks Co. vs. Kansas City, 62 Fed. Rep. 653, it appeared that the Circuit Judge below had valued the property of the waterworks company at the sum of $2,714,000. The commissioners' valuation of the physical plant, (Kiersted and Moore), was $2,546,112. The valuation as found by the Circuit Court of Appeals, was $3,000,000.

Id. Id., p. 866.

If the commissioners' valuation of the physical plant is deducted from the award as to the fair value of the plant finally found by the Circuit Court of Appeals, a difference results of $453,888, as the difference between the entire value of the plant and the valuation of the physical plant, thus making said sum represent the value of the going concern and the ratio of the going value to the value of the physical plant would be 17.8 per cent. If, on the other hand, the action of the Circuit Court as fixing the value at $2,714,000 be treated as the valuation of the physical plant instead of the amount fixed by the commissioners this would leave the sum of $286,000 as the value of the going concern, or a percentage of going

value to value fixed by the Circuit Judge of 9.53 per cent. In speaking of this matter of going concern in said case, it is stated:

"Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. * * * The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. * * * It steps into possession of a property which not only has the ability to earn, but is, in fact, earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn."

Id. Id., 865.

The above cases were cases wherein, for the purpose of purchase, cities were determining the fair value of plants. It is submitted that the purpose of the valuation

can make no difference with respect to the elements that enter into and result in the determination of fair value. The fair value must be the same, regardless of the purpose for which it is ascertained. If we go beyond the cases and look, historically, to the question of going concern, as to which we do not know whether this Court can consider, we find a uniform concurrence in principle and in practical result with what was determined as the ratio, approximately, of going concern to the value of physical plant noted in the above cases. For instance, referring to Ch. 307 of the Acts of Massachusetts for the year 1902, and to the published report of Selectmen of Milton, Mass., upon the subject of water supply for that town for the year 1902, the town engineer therein, Mr. Allen, says: "The value of the physical plant, without taking into account its value as a going plant, is $265,000."

The Selectmen, after discussing the elements and facts affecting the going value in said case, say:

"These facts indicate that the company, after twelve years, for the first six of which it paid nothing to its stockholders, and for the last six 2 per cent. per annum, has reached a point where it is just about to receive an equivalent for the time and money that it has put into the plant. In passing upon its value, we must take that into account, and consider how much more it is worth, having reached a profit paying basis, than as if the town had just built a plant and had to go into the market and wait for its customers for years. Upon these considerations, it would seem to us after a close examination,

and taking the judgment of our experienced engineer and counsel, that the sum of $50,000.00 is not in any sense an exaggeration to be added to the value of this plant; and that carried its value up to $315,000."

The ratio of going value, $50,000, to the value of physical plant, $265,000, in this determination was therefore 18.9 per cent. In pursuance to these valuations enabling legislation by the State was procured, and the property was purchased by agreement upon the basis of the above mentioned report.

Ch. 307, *Acts Mass.* 1902.

Likewise in the case of valuation made in November, 1902, of the water plants of the towns of Dover and Foxcroft, Maine, the award of the commissioners was $135,-659, which included the valuation of the going concern which had been fixed by the experts at $25,000 and $30,000 respectively, so that the excess of the total appraisal above the value of the physical plant was, approximately, $30, 658, thus making the ratio of excess of appraisal considered as a going concern, above the average of the valuation of the physical plant, 29.2 per cent.

Taking an average of all the above cases, we find the same to be as follows:

Kansas City	17.8
Newburyport	17.0
Gloucester	19.7
Milton	16.8
Dover and Foxcroft, approximately	29.2
Average of all	20.5
Av. excluding Dover and Foxcroft	18.4

In the present case the Master has allowed a little less than 11 per cent. upon the valuation of the physical plant, exclusive of the valuation of going concern therein included.

We, therefore, insist that the principle of allowance of going concern is supported in reason and by authority, and the only question for the determination of the Court, therefore, of any difficulty being the amount for which an allowance should be made, and in the absence of any other testimony, which testimony is heretofore shown to be well within the allowance upon that question, such allowance as is made in this case being half of the allowance as supported by Complainant's witnesses, should not be in this Court disturbed, unless it be to raise it to approximately the amount testified to by Mr. William Wheeler, $133,000, (Printed Record, Page 2139) or to an amount measured by percentages found to be just and equitable in the cases above quoted.

Appellant, in the 8th pargraph of its assignments of error, with respect to valuation fixed by the Master and Court below, assigns as error (c) as follows:

"In estimating or confirming the Special Master's estimate as part of the value of this plant, unused portions of the plant, such as blind services, etc."

We doubt whether or not, under the rules of this Court, this assignment is in proper form, as it does not point out the amount, or principle, upon which the report of the Master and the action of the Court is excepted to with respect thereto. We will state, however, in explana-

tion of the assignment that it involves the question of allowance for that part of a service which Complainant has put into its system as required from time to time in such district so that it may be ready when its use shall be called for, but which at the time is not used; in other words, it is a service which when constructed has no connection with private service or other premises, and for that reason is called blind. The principle, doubtless, upon which this exception is intended to be taken is that this service is not being actually used for the public service. But it appears from the testimony that the City very properly requires these blind services at the time to be constructed so as to save the streets from injury by taking up asphalt, brick, or other street paving thereafter.

We insist that outside the special requirements of the City for blind services in this case, it would be well within the rights of the Water Company to provide these blind services as a part of its general plant in use for the public service, and the same would be justified upon that ground as property owned and used in a broad sense for the public service, but that question does not arise with respect to these particular blind services, for the reason that appellant actually required complainant to install these blind services at the time and in the manner in which they were installed, and for which they are to be valued herein.

As to these blind services, William Wheeler testifies as follows:

"A. Yes sir, the city passed an ordinance requiring the Water Company to move its pipes where needful

from their then existing location so that the sewers might be laid along the middle of the street, and also to lay service pipes from the street mains to the curb lines in advance of the paving of the streets, and all at the cost of the Water Company.

"Q. Were the service pipes referred to in the last question and answer laid by the Company?

A. They were.

Q. And in compliance with the ordinance?

A. They were."

Printed Record, pp. 445-446.

From this it is obvious that the city, in undertaking to regulate the rates of complainant, is now estopped from claiming that the pipes laid at the city's direction should not be valued as a part of the company's property. It will be observed by the Court, however, that in the Master's finding as to the fair value of complainant's plant, as of date March 30, 1901, the value of blind services was excluded, and complainant, by its 10th exception, assigned that exclusion as error.

Printed Record, p. 191.

The Court, after considering all the exceptions filed both by plaintiff and defendant, sustained only this 10th exception, thereby adding to the valuation fixed by the Master the value of the blind services.

Printed Record, pp. 300-301.

The number of these blind services, March 31, 1901, was 206.

Printed Record, p. 446.

As it appears that these blind services are laid from the street mains to the curb lines, they are of the same value as were services laid complete in the paved streets, less the cost of extending them from the curb line across to the property line and putting on a stop and waste. The ordinary cost of this last work is about $1.50 for each service.

Printed Record, p. 2066.

We have shown that the services under paved streets, completed, are valued at $19.50. Deducting the cost of running the pipe from the curb line into the property and allowing an equal amount for replacing pavement, these blind services should be valued at about $16.50 each. or not quite $3,400 for the 206 that were in existence March 31, 1901.

A further assignment of error by appellant with respect to the valuation of complainant's plant is under sub-section (d) of Assignment VIII, and is as follows:

"In estimating or confirming the Special Master's estimate as part of the value of this plant of such things as did not enter into the original construction of the plant, though they might be necessary in a reconstruction of the same at the present date, such as the restoration of pavement or macadam on the streets over the pipes. This amounts to some $15,000.00."

Printed Record, p. 235.

The error of appellant in this assignment arises out of the idea that because the Water Company did not restore the pavement or macadam on the streets over the pipe, the cost of this replacement is not to be added to the valuation of plaintiff's plant, and especially to the valuation of the pipes under said paved or macadamized streets. The value of this plant must be determined under conditions existent on March 30, 1901, when the ordinance was passed. If consideration be given to the fair original cost of any part, it should be in *toto*, or for the whole property as well.

Brunswick & Lopsham vs. Maine Water Co.,
99 *Maine* 371.

It may be that the iron pipes used for the transmission of water may have originally cost $30 or $35 per ton, and yet the Master in his report following prices as they prevailed on March 30, 1901, placed the value of the piping at only $23.50, the prevailing price at that time. If complainant must submit to a valuation at the price fixed as of March 30, 1901, there certainly must be taken in consideration in favor of complainant, conditions affecting said pipe as of date March 31, 1901, and while the pipe under ground, taken as an independent proposition, should be properly valued by the Master as an item entering into the valuation of the entire plant, yet as the system of the complainant is composed largely of pipe under macadamized and paved streets, so also should be added to the value of the plant what it would cost, as of that date, March 31, 1901, to place pipe in that condition under paved and macadamized streets;

in other words, the Master has valued the pipe correctly as though it were upon top of the ground and at the prices prevailing in the market at that time, and this pipe being in fact not upon the top of the ground but under paved and macadamized streets, and no additional valuation being given to the pipes on that account, it seems to us obvious that the Master is right in ascribing to the general value of complainant's plant what is due to the condition then prevailing, and which would be necessary to usefully place said pipes; that is, the sum necessary to excavate and restore said paved or macadamized streets in order to utilize said pipe as a part of the system of complainant and to replace, therefore, the streets in the condition in which they were before the laying of such pipes; in other words, we insist that by placing these pipes before the streets were paved and macadamized, the Company has acquired for itself the value of pipes placed in the ground without the burden of removal of paved or macadamized streets, although some of the pipes were laid in streets which were macadamized at the time; that is to say, on March 31, 1901, the value of complainant's plant consisted in the paved districts of not only the pipes under the ground, but also of the cost of removing said pavements, and placing said pipes under them, and therefore the value of complainant's plant was enhanced in this way as properly held by the Master.

The only other exception that need be noticed in connection with the value of complainant's plant, as fixed by the Master and the Court, is that contained in subsection (f) of Assignment VIII, in which appellant assigns as error the alleged refusal of the Master and the Court to consider alleged serious defects in the con-

struction of plaintiff's plant, in its intake tower, etc. With respect to this assignment it is only necessary to say, that it is shown conclusively in the record that the alleged defects are purely imaginary. They have not affected the water furnished to the public or the value of complainant's plant. They were considered by the Master and rejected, not because they should not be considered, but because the Master decided that the claim of the City with respect to the improper location of the intake tower, among other imaginary and trifling defects alleged, was without effect upon the value of the plant.

"In connection with this intake tower, defendant claims that it is of no value, because it is below the mouth of White Spring Branch, which empties into the river some two hundred yards above. Drs. Deaderick and Miller testify that this small stream comes out of a hollow some three-quarters of a mile long, inhabited by the poorer class of people, who have no sewerage, and that when a hard rain comes all refuse goes into the river immediately above the intake tower. No analysis of the water is shown, and complainant relies upon the fact that its franchise compelled it to build its pumping station at that point, which is undoubtedly true.

If good cause exists why the water should not be taken here, the city has its remedy by proper legal steps. Until this is done I certainly think the intake tower should be given its full valuation. It is there serving its purpose, and may be for many years yet."

Report of Master, Printed Record, p. 177.

The article of agreement for the construction of complainant's waterworks with the City of Knoxville, requires the water "to be taken from the Tennessee river at the site purchased by the city for that purpose."

Printed Record, p. 23.

It is undisputed in the proof that the intake tower was established at the very point required by said agreement, and upon the site which the city itself had purchased and had sold to the complainant company under the agreement above set out.

Testimony William Wheeler, Printed Record, p. 2180.

So that it is manifest the City is estopped in this case to raise such question, especially in the absence of any proof whatever that the grievance on that score is anything but imaginary. It is admitted that there is no proof to the effect that the location of the intake tower as required by the City has reduced to any extent the fair value either of the intake tower or the plant of complainant, and no claim to this effect is now made in appellant's brief.

This disposes of all the assignments of error which appellant makes to the value as found by the Master, and we insist that this Court, after consideration of all of them, will find that the Master, confirmed by the Court, has found the fair value of this plant correctly to be not less than the sum of $608,000. And it will be noticed that in the above value is included $60,000 for going concern,

while the reproduction estimate of Wingfield & Ludlow, at $618,000, does not include, of course, going concern; thus the Master's found value is really exclusive of going value some $70,000 less than the replacement value.

NINTH ASSIGNMENT OF ERROR.

The Ninth Assignment of Error is to the action of the Court in refusing to have the Master report upon the actual income of complainant's plant under its own rates for any period subsequent to the passage of defendant's ordinance of March 30, 1901.

It is insisted by counsel for appellant that:

"As the city ordinance makes a horizontal reduction of about 20 per cent of the company's rates, the Court, by reducing the actual receipts of this company, after the pasage of the ordinance, by 20 per cent, could have ascertained with almost mathematical certainty what would have been the plaintiff company's income under the city's ordinance. Instead, the Court erroneously had the Special Master to report upon the income of the preceding year only, and speculated from that standpoint as to what would have been the income for the next year, and what would have been probably realized under the ordinance."

Printed Record, pp. 235-236.

This assignment of error is not well taken, for the reason that it has been well settled that the proper method of determining the effect of a given rate regulation upon income is to take the effect of such regulation

for a term preceding the date of its enactment, and not for a time subsequent thereto.

In the case of Chicago and N. W. Ry. Co. vs. Dey, 35 Fed. Rep. 881, Judge Brewer said:

"Again it is said that it cannot be determined in advance what the effect of the reduction of rates will be, oftentime it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present, but speculations as to the future are not guides as to judicial action. Courts determine rights upon existing facts. Of course there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect, but the only fair judicial test is to apply the rates to the business that has been done in the past and see whether, upon that basis, such rates will be remunerative, or to compel the transaction of business at a loss."

Chicago, etc., vs. Dey, 35 *Fed. Rep.* 881.

In the case of Smyth vs. Ames, 169 U. S., the question was presented whether or not it was proper to apply the law reducing rates to the past business of certain railroads in Nebraska. In that case the test was made by taking the income for the three years preceding the date of the passage of the law reducing the rates, and in discussing that matter the Court said:

"The first and most important contention of the plaintiff is that, if the statute had been in force during any one of the three years preceding its passage, the

defendant companies would have been compelled to use their property for the public substantially without reward and without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used."

Smyth vs. Ames, 169 *U. S.* 528.

Thus the properties of the several railroads were valued as of the date of the passage of the rate regulation statute, and the incomes were taken for the three years immediately preceding that date and the reduction made by the act applied to the income for said preceding years. The Act of Nebraska in question took effect Aug. 1, 1893. The suits were brought July 28, 1893. The three years for which the income of the several roads was taken were the years ending the 30th day of June, 1891, 1892 and 1893, respectively. Id. 533.

The case of Smyth vs. Ames was tried at the October term, 1897, of this Court, and was decided in March, 1898, affirming the judgment of the Circuit Court. It was provided in the judgment of the Circuit Court that: "When the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid," the defendants might apply to the Court, by bill or otherwise, as they might be advised, for a further order in that behalf, it being provided in the Nebraska Act, Section 6:

"That the Board of Transportation is hereby empowered and directed to reduce the rates on any class

or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said Board so to reduce any rate; and said Board of Transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established, whenever it shall appear to a majority of said Board just and reasonable to revise said classification."

Id. p. 474.

From the above it will be seen that the Court below in its decree with respect to the years for which the income should be taken, and to which the reduction of rates should apply, followed the decision of this Court in the case of Smyth vs. Ames, for which reason there can be no error in its action.

Is there any more reason why Judge Clark should have said, in the case now upon trial, that he would require testimony with respect to the income of the Water Co. for the years 1902 and 1903 than that this Court, acting upon case of Smyth vs. Ames in 1898, five years after the passage of the Nebraska Act of 1893, should have sent that case back in order that proof might be taken to show the effect of the act as tested by the incomes of the railroad companies for the years between 1893 and 1898?

It is further insisted in this connection, by appellant, in its assignment of error and brief that as the original bill in this case was not filed until eight months after the passage of the ordinance, and proof was at first

allowed by the Master under a misconstruction of the Court's ruling for a period beyond twelve months after the passage of the ordinance, the year subsequent to the passage of the ordinance is the year for which income and expenses should be taken, and with respect to which the effect of the ordinance should be decided; but at the same time the appellant insists that the basis of the valuation on which a fair return must be had is of the date when ordinance was passed. This proposition is negatived by the case of Smyth vs. Ames, supra, but aside from that it is fallacious, for if the income and expenses for the year or years succeeding the passage of the ordinance must be the basis of comparison, the Company must be entitled to a fair return upon the value of the plant during the time that income is realized on it, for the reason that the property produces the income, and it is the fair value of the property in use for the production of a given income which is the basis for the determination of rates. In other words, suppose that this Company, on March 31, 1901, had property in use for supplying water, to the fair value of $1,000,000, and that taking the average of the year succeeding, its property, at a fair value, was worth $1,500,000 by either increase in value or additional construction, and the income calculated as of the conclusion of the succeeding year was a certain amount, it is manifest that in such a case the Company is entitled to receive a fair return on its entire investment during said year, and in this case, if the Master, instead of taking the income and expenses of the year before the ordinance was passed, as in the case of the Railroad against Dey, should have taken the succeeding year where there was an increase

of $5,000 to $7,000 in income, it would have been necessary to allow for the increased construction and increased value of the succeeding year. There was additional construction alone during the year from March 31, 1901, to March 31, 1902, of $73,486.01.

Testimony William Wheeler, Printed Record, p. 645.

Assuming, therefore, that if the year subsequent to March 30, 1901, i. e., up to March 30, 1902, were taken as the basis for the earning of income for that year, it must be admitted that there is no certain proof in the record for the ascertainment of the value of the plant for that specific year. However, from the testimony it can readily be approximated. The replacement estimate of Wingfield and Ludlow as of March 31, 1901, is $618,100.24

Testimony Wingfield, Printed Record, p. 1961; *Testimony Ludlow, Printed Record, pp.* 2077-2078.

Mr. Ludlow also gives a replacement valuation of the plant, as of date Sept. 30, 1902, or for a period of one year and six months after the passage of the ordinance, of $740,068.36.

Printed Record, p. 941.

Thus showing that, including additional construction, the difference between the two replacement statements

represents approximately the increased value of the plant as of Sept. 30, 1902; or in other words, the replacement value of the plant of Sept. 30, 1902, was worth more than the replacement valuation of the plant as of date March 31, 1901, by the sum of $121,968.12.

So that, as bearing upon the question of fair return measured by the value of the property and its increased income for the year subsequent to the ordinance, there could be no material change, as affecting the question of fair return, upon the fair value of the property during the time it was used for the public, it being manifest that where both replacement estimates are used, as of March 31, 1901, and Sept. 30, 1902, the relative difference between said amounts represents, not only the difference between said replacement estimates, but also the difference between the real values of the plant or its increased value Sept. 30, 1902. The same allowances made in this case as a fair return on the value of the plant, as of date March 30, 1901, if applied to the additional value as of date Sept. 30, 1902, would more than equal the additional income derived from the plant the year subsequent to the passage of the ordinance, even under existing rates.

Appellant states in its Assignment of Error, subsection (a) of general assignment IX, that the "income of the year succeeding the passage of the ordinance exceeded that of the preceding year by about $13,000.00."

Printed Record, p. 236.

when, as a matter of fact, according to the uncontra-

dicted testimony in the case, it is the difference between $88,481.39, the income of the year ending March 31, 1901,

Printed Record, p. 714,

and $95,452,12, the income for the year ending March 31, 1902,

Printed Record, p. 716,

or an additional income of $6,970.73, excluding expenses in both instances. The increase of expenses, however, for the year subsequent to the passage of the ordinance was $1,227.36, the expenses for the year ending March 31, 1901, being $35,775.89,

Printed Record, p. 715,

and for the year ending March 31, 1902, $37,003.25,

Printed Record, p. 717,

When the defendant first called for testimony in regard to the value of the plant at a date later than March 30, 1901, the plaintiff objected, on the ground that any testimony in regard to the business affairs or condition of the plaintiff after March 31, 1901, was irrelevant and incompetent. This exception was overruled,

Printed Record, p. 498,

and the evidence objected to was admitted. Subsequently, however, the Master changed his ruling upon this point

and held that he should not have admitted proof "on any period after March 31, 1901,"

Printed Record, p. 169,

and he stated expressly in his report that he thereafter excluded such proof and had not considered it in his report.

Printed Record, p. 169.

After this final ruling of the Master excluding this testimony, it was, therefore, not necessary for the plaintiff to except.

The Master further states that he had at first admitted testimony as to later periods because of a misapprehension of the ruling of the Judge on the point.

Printed Record, p. 169.

The question as to the amount of gross income found by the Master for the year ending March 31, 1901, is raised by appellant's assignment of error, sub-section (b) under general assignment IX,

Printed Record, p. 236,

and it is contended therein that the Master was in error in not allowing "$208.00 excess of accounts carried out at the end of the year over the amount of accounts carried in at the beginning of the year; and that about

$2,300.00 or $2,400.00 for taps and supplies which are likewise income accounts." This, of course, raises a question in the main of fact, and the action of the Master is abundantly supported by the record. On its face it would seem to be absurd that items such as these, which do not represent profit at all, should be claimed as a part of the income of the Company. The action of the Master upon these items is shown at page 181, Printed Record.

The argument on this point by the appellant is that as the charge for the taps was paid, in the first instance, by the consumer it is not, therefore, a proper construction cost. The fact that it was paid principally by the consumer does not alter the fact that it is essentially a construction item. If the entire distribution system of the Company had been laid by it, principally at the cost of consumers, who were to receive the services of the Company in return for their contribution to the extent of the cost of laying such mains, that would not alter the fact that the contribution so made by consumers was a part of the construction cost of the plant.

Upon the question of "supplies" the Master said in his report "I may not understand this question, but cannot see under what aspect defendant claims this to be income."

Printed Record, p. 181.

The transactions upon which the appellant bases its claim upon this point are entirely internal transactions of the Water Company dealing with itself, and no money passes, and no profit or loss, as the case may be, accrues to the Water Company.

The witness Frank C. Kimball testifies as follows on this subject:

"I will state as an example that all pipe and pipe supplies, gates, hydrants, lead, etc., when they are purchased are charged to an account called the 'supplies account,' and placed in stock. When an extension is made—a few hundred feet of pipe laid—the material is taken from stock and charged to that particular extension at as near cost prices as we can get at it, but these cost prices may vary somewhat, so that it is impossible for the books to show the direct unit price for these particular pieces of work."

Printed Record, p. 816.

Sub-section (c) under general exception IX, Printed Record, p. 236, is as follows:

"In refusing to take into consideration, for any purpose whatever the fact or proposition that a reduction of rates is calculated to increase in some measure at least the business, and possibly the income, of the Company."

It will be noted by the Court that in sub-section (a) of this same general exception appellant says:

"As the city ordinance makes a horzontal reduction of about 20 per cent of the company's rates, the Court by reducing the actual receipts of this company, after the passage of the ordinance, by 20 per cent, could have ascertained with almost mathematical certainty, what would have been the plaintiff company's income under the city's ordinance."

This is an admission that if the Water Company's rates had been reduced by the application of the ordinance during the year subsequent to the passage of the ordinance, the amount of income thus received would have been reduced to a mathematical certainty, by the percentage of said reduction.

The first proposition raised under the assignment of error now under discussion is that it should not be assumed, under the facts in this case, that the rate ordinance, if applied, would have reduced the income by the amount of reduction made by the ordinance. This same question was discussed in the case of Smyth vs. Ames, supra, and in that case for the three years prior to the date of the Nebraska Act the reduction made by said Act was applied to the income actually earned, which is the same method of treatment that was adopted in this case by the Master and by the Court.

Smyth vs. Ames, 169 *U. S.* 534 *et seq.*

The same rule was announced in the case of Railroad vs. Dey, wherein Judge Brewer said:

"The only fair judicial test is to apply the rates to the business that has been done in the past and see whether, upon that basis, such rates will be remunerative, or to compel the transaction of business at a loss."

Chicago and N. W. Ry. Co. vs. Dey, 35 *Fed. Rep.* 881.

And this was so stated in answer to the contention, "that it cannot be determined in advance what the effect of a reduction in rates will be."

So that the Court below manifestly could not be in error in following the practice which has been adopted by this Court in the case of Smyth vs. Ames, supra.

Appellant in this case relies, as supporting its contention, upon the case of Railroad vs. Wellman, 143 U. S. 339. This was a case where, in 1889, the Michigan legislature had passed an act, which took effect Oct. 2, 1889, reducing passenger rates, and on which day a friendly suit was brought by Wellman against the railroad for the violation of the statute. The case was tried Nov. 22, 1889, and a judgment rendered in favor of Wellman on an agreed statement of facts, and the only question presented in this Court was whether or not the Court below should have, on request, peremptorily charged the jury that the law fixing the passenger rate was unconstitutional. This Court stated that the question was not submitted to the jury as to whether they believed that an increase of freight rates would work a reduction of income from freight, nor even whether they believed that a reduction of the passenger traffic between Battle Creek and Port Huron, would not so increase the travel as to increase the earnings therefrom. On this state of facts and pleadings this Court, speaking through Justice Brewer, said:

"Can it be, under these circumstances, that the Court erred in peremptorily refusing to instruct the jury that an Act fixing the maximum rate of two cents per mile

is unconstitutional? Is the validity of the law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must Court and jury accept their opinions as a finality? Must it be declared as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible, indeed does not all experience suggest the probability that a reduction of rates will increase the amount of business, and therefore the earnings?"

Railroad vs. Wellman, 143 *U. S.* 339.

If the opinion in the Wellman case is to be construed as holding that it is error for the Court to apply the rate fixed by statute to past business of the company, it is in manifest conflict with the later case of Smyth vs. Ames, supra; but however the case of Railroad vs. Wellman may be regarded as applying to railroads, the very argument advanced by counsel as to the character of business done by the Water Company precludes this Court from saying that, in a case of this character, a reduction in rates would not affect a corresponding reduction of income, for counsel argues that a water company is a monopoly, and quotes from the case of Bristol vs. Bristol Waterworks, 49 A. R. 975, as follows:

"A monopoly has no good will, for its customers are retained by compulsion, not by their voluntary choice."

Now, admitting for the sake of the argument, that this is true, as this Company has exclusive water privileges within the City of Knoxville, as against every one but the city, it certainly must be admitted that water

is an absolute necessity to all the inhabitants of the city, and that practically, in a city with large manufactories, as is the case at Knoxville, it is exceedingly improbable that any consumers of water in the city will or can use water except that which is furnished by the Knoxville Water Company, and so the Knoxville Water Company, being a monopoly controlling all the supply and supplying all the demand, covers all the territory, and the consumption of its product is dependent alone for its increase upon the increase of the business and population of the town. It is charged repeatedly by counsel for appellant that complainant is not dependent for its business upon good will, and in view of the assertion of this proposition, it is difficult to see how it can be assumed that in case of a water company, unlike the case of a railroad company, income can be materially enlarged by a reduction of rates, for the reason that water, being a necessity, and the rate being low, the quantity consumed is dependent very remotely on a difference of rate, and the only thing, practically, which makes the difference, a fairly reasonable rate being charged, is the additional business and uses growing up dependent on the increase of business of the city and increase of its population. All services at fixture rates if stimulated to greater use of water by a reduction of rates, would produce loss and not profit to the Company. In the case of railroad traffic from one place to another, income is dependent, to a considerable extent, on the freight rates—to such an extent that a high rate may absolutely prohibit profitable commerce, but we submit that the same condition does not, and cannot, prevail within the limited area supplied by a water company in the furnishing of a necessity. The

rule here being contended for as to the application of rates to the business which has been done was likewise sustained in Spring Valley Waterworks vs. City of San Francisco, 124 Fed Rep. 599.

In reference to this contention we think the Master has well said in this case:

"Defendant contends that reduction in price will so increase consumption as to cause no diminution in income. This may be true; the world has been frequently astonished by such results, but evidently complainant represented by parties of great experience thinks otherwise, or the rates would be reduced without this expensive litigation.

In the matter of water consumption, small consumers and the poorer people do not often use as much as their minimum rate would allow, and with large consumers and wealthier people it is not reasonable that a 22 per cent reduction would cause them to use any more water They will use all they require at the higher rate.

A reduction in railroad rates is not comparable to a reduction in water rates, in this respect; the former may gain business from competing lines, cause people to travel, or enable shippers to reach more distant markets, and still leave them a profit."

Printed Record, pp. 181-182.

Relying, therefore, on the practice adopted in the case of Smyth vs. Ames, supra, and the revenue applic-

able to a company of this kind and the admissions of appellant herein, we insist that the Master has correctly estimated the effect of the ordinance by a horizontal reduction thereby in the income of the Company for the year preceding the passage of said ordinance.

The next assignment of appellant, sub-section (d) under general assignment IX, is that the Court erred:

"In adopting the Master's division of income between city and outside city, while at the same time holding that such division was immaterial. The Court adopts the general result obtained though this unnecessary division, though not approving the principle of making such division. In other words, the 3.35 per cent return, which is calculated by the clerk and adopted by the Court as the return that could be realized under the city ordinance, is the result of a calculation made by the clerk, in which he assigns 11 per cent of income outside the city, and only about 5 per cent of operating expenses outside the city, thus depriving the city proper of its due proportion of income, and making it bear an undue proportion of operating expenses, and in this manner, after assignment, an undue proportion of the value of the plant to the city, the conclusion is reached that only 3.35 per cent can be realized as a return to the plaintiff company."

Printed Record, p. 236.

Under this assignment it is doubtful whether the appellant means to except to the fact that a division of income and operating expenses at all is made as applic-

able outside and inside the City, or whether it means simply to except to the relative per cents applicable inside and outside the City as found by the Master. If the first proposition is insisted on by appellant, then the same is decided adversely in the case of Smyth vs. Ames, supra, in which case the argument was made:

"That the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the Court should take into consideration, among other things, the whole busines of the company, that is, all its business, passenger and freight, interstate and domestic."

The Court answered:

"If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not mis-

apprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. * * * It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

Smyth vs. Ames, 169 *U. S.* 541.

But also it is said in the case of San Diego Land Co. vs. National City, 174 U. S. 758:

"One of the points in dispute involves the question whether the losses to the appellant, arising from the distribution of water to consumers outside of the city, are to be considered in fixing the rates for consumers within the city. In our judgment the Circuit Court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so

as to compensate the plaintiff for any such losses. This is so clear that we deem it unneccessary to do more than to state the conclusion reached by us on this point."

San Diego Land Co. vs. National City, 174 *U. S.* 758.

This being true, it necessarily follows that if the losses outside the city, as affecting income, cannot be considered, then the profits outside of the city, which also enhance the income, must necesarily be excluded. Losses and profits bear the same relation to income to the extent that one diminishes while the other, in the same proportion, enhances, so that the only proper use that can be made of the property, income or expenses outside the city is that use which is made of it by plaintiff in this case; i. e., to determine what part of the income is in fact without the city and what part of the expense incident to the operation of the business should be borne by the rate payers within the city and those without.

The division of percentages determined by the Master in this case, are not controverted. In fact the Master upon that question says:

"I fail to find any estimate in figures by defendant, it being content to claim that no division is made. If division is to be made at all, I have no alternative except to adopt the percentage furnished by complainant."

Printed Record, p. 183.

"A. The several subdivisions of operating expenses are the ordinary subdivisions as kept upon our books,

and the sum total of such expenses, to wit, $35,775.89, is made up of the following items:

	Entire Plant	City Proper
Alum	$1,310.78	$1,157.68
Expense	2,976.16	2,916.64
Fuel	5,431.15	4,796.79
Insurance	564.43	547.17
Filter Station	2,270.28	2,247.58
Pump Station	3,948.19	3,908.71
Repairs	3,287.82	3,074.11
Salaries	7,805.06	7,024.55
Taxes	8,182.02	8,161.73
Totals	$35,775.89	$33,834.96

My computation of the several items entering into aggregate expense in city proper is made up as follows:

The cost of alum is assumed to be proportional to the revenue derived from water (all of which is filtered) paid for within city limits, namely, 88.32 per cent, and by such computation the alum charged for used in the city proper is $1,157.68, as shown on the list. The cost of fuel is computed in the same way and by the same percentage.

The proportion of "expense" charged to operations within city limits, 98 per cent, is based upon the fact that no greater reduction than 2 per cent of the total would be saved if the outside business were cut off. The extra expenses chargeable under this head of doing outside business, being nothing material beyond percentage, stationery, and printed bills incident to the number of services outside of city limits, viz: 311 on this date.

All of the disbursements for insurance were incident to the property within the city limits, excepting approximately 10 per cent. of items, $172.61 paid for casualty insurance upon the construction of new mains, services, etc., said 10 per cent being a fair estimate of such work outside of city limits.

"Filter Station" item charged to city proper (99 per cent) would not be reduced beyond 1 per cent if outside business be cut off, said 1 per cent being ample to cover cost of oil waste and reduced period of artificial lighting incident to reduced pumpage and filtration.

In regard to "Pumping Station" account, the same statement is applicable.

"Repairs" account, chargeable within city limits, 93.5 per cent is determined by charging thereto the same percentage of total repairs account as the property used for the operation of the plant within the city limits, viz: 93.83 per cent, bears to the total property used in the operation of the plant. For convenience, 93.5 per cent is made the basis of such division.

Salary account, chargeable within the city limits, is determined by deducting from administrative salaries the amount of $271.94, determined by the percentage derived from income for water outside the city limits, and the further deduction of salary paid one clerk in the Knoxville office of $469.50. These two items approximate 9.5 per cent of the entire salary account. 10 per cent is deducted for convenience and to amply cover any other proper deductions.

Taxes properly chargeable within city limits, are the entire amount paid excepting $20.29 paid upon real estate outside the city limits not used for the operation of the plant within said city limits, because the valuation by the county assessor is taken as the basis of the city assessment without deduction, except for real estate outside of city limits as above set forth.

"Q. General Wheeler, what was the amount of interest on its debt of all kinds, paid during the year from April 1, 1900, to March 31, 1901, and chargeable against the entire plant?

A. Interest on bonds and floating debt, not including preferred stock, was $30,651.89.

Q. How much was the interest for that period on the preferred stock?

A. $17,700.00.

Q. What was the amount of interest for the same year which is chargeable to that part of the plant within the city proper?

A. As 87.71 per cent. of the property of the company was located within the city limits, I would say that that percentage of the entire interest disbursements was properly chargeable upon the property within the city limits, viz: $26,884.77, interest on bonds and floating debt."

Printed Record, pp. 714-715-716.

The above testimony establishes the proper percentages allowed and presents the reasons in support there-

of, and, as the Master states: "There is no tangible, definite evidence in the record denying the percentages stated by complainant.

Printed Record, p. 182.

Another objection made by appellant under this same assignment of error is based on the fact that the rates prescribed by the ordinance make no provision for a discount of 5 per cent. for prompt payment of water rents, while the Water Company allows such a discount.

Printed Record, p. 237.

No insistence on this point is made in appellant's brief.

It will be noted that there is no double allowance to the Water Company for this 5 per cent.; in other words, there is no addition of the 5 per cent., which is allowed as a deduction for prompt payment, to the expenses of complainant; on the contrary, where prompt payment is made, there is a deduction in such case of 5 per cent. from the water charge. The Water Company might well have been allowed this 5 per cent, which its experience dictated to it, as business prudence, to be allowed for prompt payment, as part of the expenses of collection, which would have reached the same result as reached by the Master in permitting a reduction of the actual net income by the amount of 5 per cent. upon such rates as have been promptly paid. Upon this question the Master says:

"Defendant has claimed that 5 per cent. discount for prompt payment is not required under the ordinance. This makes up the greater part of what is called abatement. The business is by nature a credit business, and with many persons not financially responsible. Such a discount is common to most, if not all gas and water companies. They have not done this from generosity. It must be that it 'pays' to allow the discount, and I cannot agree that this does not of necessity apply under the reduced rates."

Printed Record, p. 182.

If the rates prescribed by the ordinance were applied, while no deduction of 5 per cent. for prompt payment is mentioned in such ordinance, yet good business prudence, as suggested by the Master, would require that some discount should be allowed for prompt payment, because, otherwise some expense would necessarily be incident to the collection of rates, and such expense might very well be greater than the 5 per cent. allowed for prompt payment under the present rules of the Water Company; but the fact, in any event, remains that it cannot be said to be unreasonable that the same percentage of discount would be a proper allowance under the new rates, as well as under the old, with beneficial results to the Company.

It is manifest that the Water Company is not, except for business reasons, donating any 5 per cent. of its rates to water consumers, and the inference therefrom is irresistible. We insist that such reduction has been

found, from the experience of the Company, to be expedient.

TENTH ASSIGNMENT OF ERROR.

Subdivision (a) of Section X, has been already considered in this brief. Sub-section (b) of Section X makes objection to the finding as to expenses of complainant because of this water rates litigation between the city and the Company have been included therein, and also such items as expenditures for cigars, etc.

With respect to the first proposition we desire to state that the cost of water rate litigation has not been included in the expenses for the year ending March 31, 1901, as assumed by said exception, and therefore, there can be no error on this point in the Master's report. Said expenses are shown for the year ending March 31, 1902, and set out in detail on page 715, Printed Record. The item for expense of water rate litigation is in the subsequent year to the passage of the ordinance.

Printed Record, p. 717.

The exception for allowance of cigars, $3.25, this Court probably will pass over as beneath its notice. It is mildly described as trivial. However, upon this subject the Master says:

"The next four items rejected were $25.00 for fire and police souvenir and $5.00 contribution to the testi-

monial to C. L. Ewing, Superintendent Southern Railway, $2.00 due the Chamber of Commerce, and $3.25 for cigars. I do not think that a Company like complainant, deriving a large income from purely local sources, and dependent for its future upon the growth of the City of Knoxville, would be expected to refuse the ordinary voluntary contributions for public purposes expected of all good citizens, upon the grounds that it is a corporation. Such a policy would be very unprofitable to the Company, on account of the unpopularity which would ensue.

As to all of these four items, except the cigars, the motive of the Company cannot be questioned. Surely it cannot be presumed that they gave away money for the purpose of increasing their expense account for this year. The matter of $3.25 for cigars for the whole year proves that it is not the custom of the officers of this Company to smoke at its expense. I have not taken the trouble to see if the record discloses the exact occasion for which these cigars were purchased. I felt safe in assuming that it was an expenditure strictly in the line of the ordinary course of business men."

Printed Record, pp. 185-186.

As to the questions raised in said assignment as to the division of the salaries of officers between operating expense account and construction account, we adopt what is said by the Master:

"We have as a result $3,328.24 charged by this Company for the salaries of its President, Treasurer and

Superintendent; certainly no one could ask that a business of this magnitude and requiring as much ability should be administered for any less."

Printed Record, p. 185.

ELEVENTH ASSIGNMENT OF ERROR.

The XI Assignment of Error is:

"The Court erred in its determination that the horizontal reduction of the company's rates by the city's ordinance was 22.88 per cent. It was at least 5 per cent. less than this or about 18 per cent.

Printed Record, p. 237.

This Court will find that this claim is contradicted by other parts of Assignments of Error by appellant. For instance, in Assignment IX, appellant admits that the "City ordinance makes a horizontal reduction of about 20 per cent. of the Company's rates." This also is in harmony with appellant's original answer, in which it is stated: "The average reduction of rates as prescribed by said ordinance is about 20 per cent.

Printed Record, p. 84.

Upon this question the Master says:

"Coming to the reduction in income consequent upon the ordinance, the first issue is the per cent. claimed by

complainant to be 22.88 per cent., and by defendant 18 per cent. The method adopted by complainant for this result is an actual demonstration; that by defendant more or less of an estimate. Complainant's demonstration method was before witness Nixon, and if erroneous he should have shown wherein."

Printed Record, p. 181.

The method by which complainant determined the reduction by application of the city's rates to be 22.88 per cent is fully shown by the testimony of the treasurer of the Company, Mr. Elbert Wheeler, and is as follows:

"A. We rated every service in use March 31, 1901, and charged therefor at the city's ordinance rates, then multiplied the amount thereof by "4" to determine the total annual charge under the city's ordinance rates. The amount derivable from metered services, was determined by taking the quantity of water charged for on each bill rendered March 31, 1901, and multiplying this quantity by either "4" or "12" as the bill may have been rendered for a quarter or a month, by which to determine the quantity of water for a year and applying the city's ordinance rate thereto, respectively. Charges for meter rental were likewise made by charging the yearly rate against each meter according to its size, in accordance with the rate prescribed by the city's ordinance.

Printed Record, pp. 713-714.

The result reached by said method, to wit: 22.88 per cent., is shown at page 713 of the Printed Record.

This is an actual demonstration, as stated by the Master, because it applies the city's rates to every service that was in use at the date of the passage of said ordinance, both fixture and meter.

The same is corroborated by the testimony of Mr. Frank C. Kimball, Superintendent of the Company.

Printed Record, p. 822.

TWELFTH ASSIGNMENT OF ERROR.

THE XII Assignment of Error is:

"The Court erred in its decision that the income realized under the city's ordinance would not afford a fair return to the plaintiff company, and erred in not deciding that 4 per cent. would be ample income to rescue the ordinance from the category of a confiscatory ordinance, but in point of fact, upon consideration of the Company's income after the passage of the ordinance instead of before its passage, the income of this Company under the ordinance would be sufficient, after paying operating expenses and providing 2 per cent. for depreciation, to allow the plaintiff company 6 per cent. return in addition to its taxes, which is more than sufficient to satisfy the demand of the law.

Printed Record, p. 237.

This is divisible into several logical sub-divisions, as follows:

1. What is, in law, a fair return to the Company?

2. Is 4 per cent. a fair return?

3. Whether or not that return should be based upon the Company's income after the passage of the ordinance?

4. The effect of the questions set out.

The third sub-divison of this Assignment of Error, i. e., whether the income after the passage of the ordinance should be considered as the basis of fair return, has been discussed and need not be further considered, and it would seem that the question of the propriety of allowing 2 per cent upon the fair value for depreciation hardly needs to be considered, the exception assuming that in addition to operating expenses no error is assignable to the action of the Master in allowing to the Company to be repaid out of income 2 per cent. for depreciation of the plant.

This brings us logically to the discussion of the question, as to what is a fair return on the fair value of the property devoted to the public service herein. As before shown, the Master has found the fair value of the entire plant of complainant at $608,427.95.

Printed Record, p. 175.

The Court has added to that valuation, the value of blind services, which the proof in the record shows to be

of the fair value of $3,390.00, as before shown, but for convenience in treating the results of the application of the ordinance in this case, we will treat the finding of true value at the sum fixed by the Master, to wit: $608,-427.95. Of this amount the property of complainant within the city as fixed by the Master, is $570.887.95.

Printed Record, p. 187

or 93.83 per cent. of the entire plant of complainant. To the action of the Master in thus determining the proportionate value of the entire plant in use in supplying the city proper, no assignment of error is made and it may be treated as conclusive, despite what is said in appellant's brief.

Report of Master, Printed Record, p. 181.

The gross revenue derived by complainant from its entire plant and property under rates in effect prior to March 31, 1901, as found by the Master, was $88,481.39.

Report of Master, Printed Record, p. 181.

After the reduction of 22.88 per cent. that would have been made by the ordinance of March 30, 1901, the income would have been $70,857.75.

Report of Master, Printed Record, p. 181.

The total revenue derived by complainant from water supplied within the corporate limits under rates in effect prior to March 30, 1901, for business year ending

on that date, as found by the Master, was $78,148.31, and the ordinance would have reduced the income inside the city to $63.342.40, there being no reduction of hydrant rentals, which amount to $11,455.00.

Printed Record, p. 182.

So that the Master has found the fair value of the plant at the time in use for the city, as of date March 31, 1901, to be the sum of $570,887.95, the income under the ordinance, $63,342.40, the expense within the city, $32,809.98, and the net income would have been, therefore, $30,532.42, the amount which would have been realized by complainant by the application of the city rates to the income of complainant, as of date March 31, 1901.

Report of Master, Printed Record, p. 187.

The Master has allowed, under the proof, 2 per cent. as a fair allowance to complainant for depreciation, and no exception by way of assignment of error in this Court is made as to the amount or fact of such allowance, and the amount is obviously fair and reasonable and is supported by the testimony.

Report of Master, Printed Record, p. 187.
Testimony William Wheeler, Printed Record, p. 634.
Testimony J. L. Ludlow, Printed Record, p. 938.
Testimony Arthur Hider, Printed Record, p. 992.
Testimony T. T. Johnston, Printed Record, p. 1010.

The principal witness for appellant, William Nixon, approves the principle and amount of depreciation allowed in this case; see also Chas. S. Brown, expert witness of appellant.

Testimony W. M. Nixon, Printed Record, p. 1382.

Testimony Chas. S. Brown, Printed Record, p. 1855.

The Court is familiar with the principle on which this allowance is made and needs no discussion of the testimony going into the rationale thereof, and there being no assignment of error questioning the propriety of the allowance or the amount thereof, we hardly need to cite any authorities. However, on account of its importance it may be not out of place to refer to some of the cases.

In the case of San Diego vs. National City, 174 U. S., 757, it was held that one of the things to be taken into consideration when rates are being fixed which under all the circumstances shall be just to the Company and to the public, is "the annual depreciation of the plant from natural causes resulting from its use." This case is not out of harmony with the case of San Diego Land and Town Co., vs. National City, 174 U. S., 739, wherein it was declared that annual depreciation was to be considered with other things, but using this further language:

"We will say a word about the opposite contention of the appellant that there should have been an allowance

for depreciation over and above allowance for repairs. From a constitutional point of view, we see no sufficient evidence that the allowance of 6 per cent. on the value set by the supervisors, in addition to what was allowed for repairs, is confiscatory. On the other hand, if the claim is made under the statute, although that would be no ground for bringing the case to this Court, it has been decided by the Supreme Court of California that the statute warrants no such claim."

San Diego Land and Town Co. vs. Jasper,
189 *U. S.*, 446.

So that it is seen that the Jasper case was decided under the California statute, which had been construed by the Supreme Court of California to warrant no claim for depreciation beyond 6 per cent. and repairs. In this case, if an allowance had been made sufficient to cover all repairs and 6 per cent. interest, it would have exceeded largely the allowance which the Master and the Court decided will be the return upon the fair value of the property of complainant as established by the application of the ordinance of the city, and this notwithstanding the fact that we are not limited by any statute which forbids this Court to take into consideration what the evidence shows to be a proper allowance to be added to the 6 per cent. by way of annual depreciation.

In the case of Spring Valley Water Works vs. City, etc., of San Francisco, 124 Fed. Rep. 599, Judge Morrow says:

"The complainant asks that an allowance be made of $196,000.00 for the element of deterioration of the perishable part of the plant during the year. It seems just and proper that such an allowance should be made. It is sanctioned by authority, but I do not think it necessary to take that element into consideration at this time."

It may, therefore, be assumed that the allowance of 2 per cent. on the fair value of the property as made by the Master and approved by the Court is unquestionable. It is established by the testimony of the complainant and of the defendant herein, and is not called in question in this Court. Two per cent. upon the fair value of the plant at the time in use for the city as found by the Master, viz: $570,887.95, is $11,417.76. Deducting this from the net income as found by the Master for the city proper after the application of city rates, of $30,532.42, leaves as applicable to the fair return upon the property, the sum of $19,114.66, which is 3.35 per cent. upon the fair value of the plant as found by the Master at the time in use for the city, as of date March 31, 1901, and without the addition thereto of the value of the blind services as allowed by the Court.

Then, under all the facts and circumstances of this case, is a return of 3.35 per cent. upon the fair value of the property devoted to the public service, a fair return thereon at the time, place, and under the conditions surrounding said property.

Upon the question of the allowance necessary to constitute a fair return outside of the payment of expenses

and fair allowance for depreciation, the Master in this case says:

"The legal rate of interest in Tennessee is 6 per cent. No lower rate is known, except with mortgages on improved property, and the amount limited to much less than the value of the property. There is practically no risk in this. It is clear that no one in this State would think of giving par for stock in this kind of company, subject to the risks of litigation and competition if it paid less than 6 per cent. Fair income or interest is a local question, not controlled by cases from other States. The Chattanooga case fixed 6 per cent. Clearly this is fair; it follows that with 6 per cent. and 2 per cent. for depreciation making 8 per cent. on the above, we have $45,671.03, which is $15,138.61 more than I have found would be the net income under the ordinance. The ordinance rates would not yield a fair income to complainant."

Printed Record, p. 187.

The Court below in passing upon this phase of the question, says:

"If we contrast such an investment as this with the usual commercial forms of loan on good security, or again, investments in United States bonds, at a very low rate of interest, the desirableness of the one form of investment, its safety and certainty, as against the other, it is too impressive and important in its bearing on the question here to remain unacknowledged. Well secured loans of capital begin to repay the stipulated income from

the very day of the loan. The capital is not subject to depreciation or loss, except as would be involved in a condition of insolvency, and if secured by real estate or other property, or collateral, insolvency would not affect the loan. The rate of income is uniform.

As I have said from the beginning, in a plant like this it takes time, effort, close attention, constant watchfulness, etc., to secure any return, and the returns in the earlier years are very small, if any, and the difficulty of guarding against depreciation and loss is very great. * * That capital invested in an enterprise of this kind, owing to the less desirable and less satisfactory conditions under which it is invested and maintained, is entitled to a larger income than would be regarded as fair and just on money put out on loans, well secured, is too evidently plain not to be acknowledged." * * * "It is agreed by counsel that the ordinance in question and the rates established thereby, on the reasonable value of the plant as found by the Special Master, would give to the Company a return thereon of only 3.35 per cent. annually.

The Water Company is not necessarily entitled to the rate of interest establised by the statute of the State, nor to any other fixed rate of income, but only to what, under all the circumstances of the situation, is a fair and reasonable return on its property devoted to the public use.

The Courts are always justly reluctant to strike down an ordinance of a municipal legislature, or a similar enactment by the legislature of the State, or of the United States, but it becomes necessary now and then to do so in order to afford that constitutional protection which is

guaranteed to every citizen under our government, and which guarantee furnished a powerful encouragement to investment, to developing the natural wealth of the country, and to the free enjoyment of all other rights of persons and of property.

Under all the facts and circumstances of this case, and after much deliberation, I conclude that the return which this ordinance permits on capital put into this form of investment, and subject to the hazards which pertain to such investments, managed at the best, does not permit a fair and reasonable income on the value of the property.

It seems to me also that I must take into consideration that as a matter of law the City of Knoxville is at liberty, if it chooses to do so, to establish and operate a water plant of its own, and in that way come in direct competition with the business of this plaintiff, and in that way it would be rendered much more difficult for the plaintiff to maintain and operate its plant and obtain any reasonable return on its property devoted to public use. Indeed such a condition might become destructive. The adjudged cases show that just such a thing has occurred in the history of our country. And it is a fact, though perhaps not technically before the Court, but still disclosed by the records, that the Water Company recently undertook by the bill filed in this Court to enjoin the city from taking just this step,as being in violation of its vested contract rights, and upon full consideration of the question, this Court decided that the city possessed the right and power to build and operate such a plant, and the existence

of such a right in the city, liable at any time to be availed of in practical use, is a circumstance showing that investments in property like this water plant is much less secure against permanent loss and against legal return on the investment than other forms of capital, like well-secured, interest-bearing loans, or commercial or industrial establishments not maintained under similarly uncertain conditions."

Opinion of Court, Printed Record, pp. 304-305-306-307.

As reenforcing the observations of the Court just quoted, we state that it is shown without contradiction in this record that in the history of complainant's plant the Company has never been able to pay any dividend whatever upon its common stock, but that its income has been practically exhausted with an exception, which will be stated, in the payment of operating expenses and interest upon its bonded indebtedness and preferred stock, which last in this case is really indebtedness.

Testimony of William Wheeler, Printed Record, p. 531.

Testimony Elbert Wheeler, Printed Record, pp. 722, 797.

It is likewise shown that it has never been able to make any allowance out of income to cover, to any extent, depreciation, either complete or incomplete, although there is a balance of $19,344.94, which has been recorded

on the books of the Company as of date March 31, 1901, as applicable to depreciation.

Testimony of Elbert Wheeler, Printed Record, p. 720.

According to the analysis of William Wheeler of the investment cost of the plant from time to time as material and labor entered into the construction, there was completed depreciation, caused by parts of the plant taken out and replaced by machinery more effcient for the increased needs of the plant, aggregating approximately $95,000. He also shows incomplete depreciation, which represents the depreciation, according to his method of reaching the investment cost of the plant, of approximately $77,000.

Testimony William Wheeler, Printed Record, p. 433.

While these figures, as hereinbefore shown, are not logically applicable to the estimate of fair value of the plant fixed by the Master, yet they illustrate the hazards attending the operation of a plant of this character as distinguished from ordinary business enterprise, and thus bear upon the question of a fair return, just to the public and to the Company, for it is admitted in this record that the $95,000 of complete depreciation has received no allowance whatever at any stage of the company's development, and is an absolute loss to the Company, except to the extent that the $19,000 set aside after

the payment of interest and expenses may be treated as applicable to the complete or incomplete depreciation. No such hazard attaches to ordinary investments nor ordinary business enterprises which are not dependent on public rates for income.

As stated by the Master and by the Court, the legal rate of interest at which money shall be loaned and the rate applicable to judgments, etc., is 6 per cent. in Tennessee. It might be true that 6 per cent. for simply the loan of money where no further trouble or risk is had or on a judgment might be entirely adequate, and yet that 6 per cent. would not be the fair measure of return upon an uncertain, hazardous business venture such as that of the Water Company. In the case of New Memphis, etc., Co. vs. City of Memphis, 72 Fed. 955, an opinion by Judge Clark, it is said:

"And the very use of the term regulation implies that an investigation shall be made; that an opportunity to present the facts should be furnished; that when the facts are established they shall, by the regulating power, be given due consideration, and that such action as shall be taken, in view of these facts thus ascertained, shall be just and reasonable, and such as enables the Company to maintain its existence, to preserve the property invested from destruction, and to receive on the capital actually and *bona fide* invested in the plant, a remuneration or dividend corresponding in amount to the ruling rates of interest. The Company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid, fixed charges, so far as bonds or securities represented and expenditure

actually made in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise.

Memphis, etc., Co. vs. Memphis, 72 Fed. Rep. 955.

As stated by the Supreme Court of California:

"What the Company has parted with, what the public has acquired, is the money reasonably and properly expended by the Company in acquiring its property and constructing its works. The State has taken the use of that money, and it is for that use that it must provide just compensation. What revenue money is capable of producing, is a question of fact, and theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demands for the product of this enterprise. It would not, of course, be reasonable to allow the Company a product equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered." * * * "In ordinary cases where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the Company from paying interest on borrowed money at the lowest market rate obtainable, and even then some allowance or margin should be made for

any risk to which the Company may be exposed, over and above the risk taken by a lender."

San Diego vs. City of San Diego, 62 *Am. St. Rep.* 271-272.

Now it is shown that a few of the bonds of the plaintiff were floated at much lower than their face value, at a smaller rate of interest than 6 per cent, but all the capital otherwise used is at 6 per cent. and excess, and it is a matter of which the Court would take judicial knowledge that in the section where complainant's plant is operated, it is almost impossible to get any money without paying 6 per cent. interest, and that no one would embark in even what is regarded as a safe business with an assurance of only 6 per cent. interest. If that be true, then it is readily seen by the Court that in a risky business, such as that of the plaintiff, subject to municipal and legislative control as to rates, and a plant which has in its whole history only recently paid anything above its fixed charges, 6 per cent is a very low return indeed upon the value it actually has in the property devoted to the public use, and if the Court should to any extent disallow, either as expenses or as part of the fair value, the depreciation, incomplete, it is seen that the risks of the business then have resolved themselves almost into a certain loss, even on an allowance of 6 per cent. interest and 2 per cent. depreciation.

It is also stated in the opinion of Chief Justice Batty, in the case of San Diego Water Company vs. City of San Diego, 62 Am. St. Rep. 288, as follows:

"Rates ought to be adjusted to the value of the service rendered, and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency and declare a dividend to stockholders equal to at least the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing water to consumers."

San Diego Water Co. vs. City of San Diego, 62 *Am. St. Rep.* 288.

The view here expressed by Chief Justice Batty was in harmony with the views of the majority of the Court in that case, and is approved by Judge Morrow in the case of the Spring Valley Waterworks vs. City, etc., San Francisco, 124 Fed. Rep. 590.

In the Spring Valley case Judge Morrow says:

"In view, therefore, of all the circumstances, the Court is of the opinion that the complainant is entitled to receive at least 5 per cent as the net compensation it is entitled to receive on the value of its property."

Spring Valley Waterworks vs. San Francisco, 124 *Fed. Rep.* 599.

It was not necessary in the case last cited, to determine whether complainant would have been entitled to receive 6 per cent, even though in as large a city as San Francisco, because a 5 per cent allowance resulted in the Court's holding that the rates fixed were confiscatory, and therefore void.

Appellant's counsel in this case argued that the rates of the Water Company were not only excessive on March 31, 1901, but had always been excessive, and yet from 1883, when the plant was constructed, up to March 31, 1901, the Company only realized, above operating expenses and fixed charges, in round numbers, $19,000, without any allowance whatever for depreciation.

It is said in appellant's brief, page 166, that: "The Water Company at all times fixed its own rates with a free hand." This statement is incorrect, and upon the contrary the right of the company in this respect has been distinctly limited at all times. The original contract made in 1882 between the Water Company and the city provides that the Company shall not charge private consumers more than "five cents per one hundred gallons" of water.

Contract, Printed Record, p. 24.

This contract of 1882 remained in force until the 20th of October, 1899, when it was superseded by the ordinance contract, permitting the consolidation of the Knoxville Water Company with the Lonsdale-Beaumont Company, which ordinance contract is still in effect and directly operative upon the Water Company and its rates. Under this instrument the Water Company assumed the obligation of the Lonsdale-Beaumont Company to furnish water to the people of the town of West Knoxville. These West Knoxville rates are prescribed by an ordinance of the town of West Knoxville which is in this record, and the Court will see from an examination of said ordinance that it contains an itemized schedule of rates, being, in

this respect, a rate regulating ordinance, just like the one contested in this case.

Printed Record, pp. 48-49.

By the ordinance contract of 1899 these rates were assumed by the appellee, and it is not charged that it has not observed them.

Printed Record, p. 61.

Also in the ordinance contract of 1899 the appellee renewed its agreement to furnish to private consumers in the territory of the old City of Knoxville water at a rate not exceeding "five cents per one hundred gallons."

Printed Record, p. 61.

It thus appears that in the territory affected by the original contract of 1882 between the Water Company and the city, there has been at all times, and now is, a contract limitation of the right of the Water Company in the matter of rates to private consumers; and that the territory of West Knoxville has had, since the consolidation of 1899, a rate regulating ordinance; this West Knoxville rate ordinance was passed September 17, 1892,

Printed Record, p. 51.

and controlled the rates of the Lonsdale-Beaumont Water Company until the consolidation of that company with

the Knoxville Water Company in 1899, and still controls the rates of the Knoxville Water Company in the territory designated as West Knoxville, which territory is now the tenth ward of the City of Knoxville. Likewise as to North Knoxville, where limited rates were specifically fixed by ordinance contract.

Printed Record, p. 32.
Printed Record, p. 61.

The question finally before this Court to be determined is whether, under circumstances surrounding this plant, the income of the Company affords a fair return, or in other words, a return which is just, under all the circumstances, to the Company and to the public, and this makes it necessary for the Court to understand the circumstances and conditions, established by contract and otherwise, surrounding this plant, as of March 30, 1901, when said rate ordinance was passed.

Under the original contract between appellant and complainant, under the terms of which complainant's plant was constructed, it was provided:

"The city shall have the right, upon giving one year's notice of such purpose and intention, to purchase from said Company, the water works herein provided for and all the property rights, franchises and privileges thereto belonging by negotiations if thus the terms can be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers, and if not purchased

at the end of fifteen years, the said works, property and franchise rights, privileges, etc., may upon the same terms and conditions and in the same way be purchased by the city at the expiration of each and every year thereafter. But in no case shall such right of purchase exist, or be exercised unless due notice thereof be given by the city to the Company one year before the expiration of the period aforesaid, or either of them. And in the event of such notice and the failure of the parties hereto to agree upon the terms and condition of sale the price to be paid, and other matters necessary to close the sale, then, in that event, each party shall choose two disinterested persons, non-residents of said city, and also of the County of Knox, in the State of Tennessee, and the four thus chosen shall select a fifth person, likewise disinterested and a non-resident of Knox County, and said five persons thus chosen shall constitute a Board of Appraisers, and having accepted their appointment each shall take and subscribe to an oath to act fairly, honestly and impartially in the premises, and having so done shall proceed to value and appraise the water works aforesaid, and all the rights, privileges, franchises, easements and other property appurtenant to said water works belonging to said Company, or for which its successors or assigns would become liable, and in view of such indebtedness shall decide, determine and award the net value of said water works, and all other property of said Company appurtenant thereto aforesaid.

And such award of said Board of Appraisers, or that of a majority thereof, shall be final and conclusive upon the parties.

And when the purchase price so fixed and determined shall be paid to said Company by the city, then said Company shall and will forthwith by proper deeds of conveyance, assign, transfer, set over and convey to said City of Knoxville, said water works, and all the rights, franchises, easements, privileges and other property appurtenant thereto owned by said Company at the date of such appraisal and award."

Printed Record, pp. 27-28.

Notwithstanding the power of purchase, either by negotiation or at the price fixed by disinterested appraisers, the appellant caused to be passed an Act of the legislature of Tennessee "authorizing the City of Knoxville to issue bonds to purchase and equip the plant and property of the Knoxville Water Company, build extensions thereto, maintain and operate the same." This is the language of the caption of said Act of 1903, p. 31 Ch. 12. A copy of the Act is printed as appendix A to this brief.

It will be noted by the Court that this Act was passed while the testimony was being taken in the present case.

Later in the same session the City of Knoxville procured the passage of another bill, the caption of which is as follows:

"AN ACT to authorize the City of Knoxville to own and operate a system of water works, and to issue bonds for that purpose, and to amend House Bill No. 28, being an Act entitled 'An Act to authorize the City of Knoxville to issue bonds to purchase and acquire the plant and

property of the Knoxville Water Company, build extensions thereto, and maintain and operate the same,' passed January 29, 1903, and approved February 2, 1903, so as to read as follows:"

Acts 1903, *p.* 328 *Ch.* 153.

Said Act is printed as appendix B to this brief.

It wil be noted by the Court that the first Act in question simply authorized the issuance of bonds to enable the city to comply, if it desired to do so, with the clause of the contract hereinbefore set out for the purchase of the plant of the Knoxville Water Company, but the city, not satisfied with that provision, procured additional legislation to authorize it, not only to acquire the plant, if it saw proper to do so, but also to build a plant to compete with the Knoxville Water Company. Suit was brought by the Knoxville Water Company to enjoin the city from the construction of a competing plant, claiming that such construction, if permitted, would be an impairment of the obligation of the city's contract with the Water Company, the city meanwhile having voted to issue bonds for the construction of the plant. These Acts were passed while the proof in the present case was being taken. The suit last referred to was decided adversely to the Water Company by the Circuit Judge, and his decision was affirmed by this Court in the case of the Knoxville Water Co. vs. Knoxville, 200 U. S. 22, upon the ground, that, while the city may have been under an implied contract not to construct a plant within the city for supplying the city and its inhabitants with water, it was under no express contract, and for that

reason the Act did not impair the obligation of a contract. So that one of the conditions rendering precarious the life and business of complainant Water Company, and affecting a fair return upon the fair value of its property devoted to the public service, is the adjudged right of the city to destroy or to impair greatly the income of the Water Company by constructing a new plant, and in this suit the city, a contemplated competitor, is in the position of undertaking to regulate the income of its competitor. This actual condition now confronting complainant, of course, was not presented at the date of the actual passing of the ordinance now contested, but subsequent developments are shown to the Court to illustrate the precarious nature of an investment of the character, the fair return on which, just to the Company and to the public, is now under consideration by this Court; these should be considered herein, because it is before this Court, that, while the city had the right to purchase the plant of complainant, upon fair and equitable terms, it caused an Act to be passed whereby it became vested with the right to actually construct a competitive plant within the city in violation of the implied contract entered into between the parties.

On this record, then, we present the question whether or not a return of 3.35 per cent. on property situated as is the property of the Water Company, in the face of a threatened construction of a competitive plant, should, at the suit of the proposed competitor, be considered a fair return on the fair value of the property devoted to the public service at a place where the legal rate of interest is 6 per cent, and under conditions which do not make even such return uniform and certain. In the language

of the cases, is such a return under such circumstances, one which is fair and just to the Company and to the public? We assumed, in treating of this question, that the Court will take judicial knowledge of the legal rates of interest in the states surrounding Tennessee, where complainant's plant is situated, which are as follows:

	Legal rate.	Allowed by contract.
North Carolina	6%	6%
South Carolina	7%	8%
Georgia	7%	8%
Florida	8%	10%
Alabama	8%	8%
Mississippi	6%	10%
Arkansas	6%	10%
Kentucky	6%	6%
West Virginia	6%	6%
Missouri	6%	8%

We think it fair to be assumed by the Court that where the legal rate of interest, as in Tennessee, and in all of the states surrounding it, is not less than 6 per cent interest, this is a fair expression of the legislative will, and of the business sense of said states; that the rates represent a fair return to the investor on the amount of his investment, and yet the lending of money, for which the rate primarily is fixed, is within the absolute control of the money lender, and can be made, therefore, entirely secure, first, as to the principle, and second, as to the return, while in a business of the character now under investigation by the Court the principal may, and necessarily will, depreciate, and the return is subject not only to the natural fluctuation beyond the control of the

owner, but to a diminution of revenue which may be caused by regulation or public competition.

Attached to this brief will be found Appendix C, showing the result of the application of the ordinance rates to the income of the Water Company in its relation to a fair return upon the fair value of complainant's property.

In the opinion in this case, the Circuit Judge says:

"In the consideration of a case like the one at bar, or any similar case, the Court is not immediately concerned with a mere system of bookkeeping, nor by striking a balance debit and credit sheets in book-of-accounts methods."

Printed Record, p. 296.

Again he says:

"The case must be considered and must be decided along broader lines than these, and under such views as may be broadly considered fair and just to both parties, without necessarily applying any or many of the technical rules which would apply to an accounting between parties sustaining the relation towards each other of creditor and debtor, trustee and beneficiary, etc., as above suggested."

Printed Record, p. 297.

These quotations are nothing more than repetitions in substance of what this Court has said more than once upon the same subject. In a case like this it is almost

impossible for a special master or for a judge or court to fix a value upon any of the various elements which must be considered, and say that such value is absolutely correct, and it is not possible for any court to say, in a case like this, that it has valued the entire property at a sum which is mathematically exact. All that any court can do is to consider the various elements, indefinite in number, and not yet fully declared even by this Court, which it is proper to consider in determining the fair value of the property. This Court has said that the various elements which it has mentioned in the cases which it has decided are to be considered, and has said in the case which perhaps mentions the largest number of these elements, that there may be others. The Court then is to take into consideration all the circumstances surrounding the property to be valued, and is to reach, by the exercise of its judgment, a determination of the fair value. It is submitted that if the Court should be of opinion that any one or more elements or parts of this property have not been accurately valued, that would not seriously affect its determination, provided it should still be of the opinion that the general result reached is fair to the public and to the complainant. The best that can be done in a case of this kind is to establish the fair value of the water plant, approximately, as exactness is clearly unattainable. These considerations apply even more forcibly to the determination of the question of fair return, and the Court in passing upon the question as to what is a fair return, just alike to the public and to the Water Company, certainly will not attempt to attain to mathematical exactness, but will consider the surroundings of the plant and everything that can reasonably affect the question.

In this case it would appear to be proper for the Court to consider, among other circumstances, the fact that the City of Knoxville, where this plant is located, is remote from the money centers of the country, and from the manufacturing centers; that the legislation of Tennessee and of all the states contiguous to it indicates that 6 per cent is the minimum fair rate upon money invested; that the attitude of the City of Knoxville is distinctly antagonistic; that the state has enacted legislation authorizing direct competition with the Water Company by the City of Knoxville, and all other circumstances that legitimately bear upon the question; reaching its determination by the consideration, not of one fact or circumstance or of a few, but by giving to all of them their proper and just effect.

It is sugested also that this is a case peculiarly appropriate for the application of the ruling established by this Court, that the concurrent finding of a master and trial judge upon a question of fact must be controlling when there is evidence to support it. It is especially true as to the subject of fair return that every case must be controlled by its own facts, and that no rule can be laid down which will be universally applicable. The Master very well says:

"Fair income or interest is a local question, not controlled by cases from other states."

It might be argued in behalf of the application of the rule just referred to, to this case, that the Master was upon the ground when the testimony in this cause was taken, had every opportunity to know the property; that he had some knowledge which it was proper for him

to use in his judicial capacity, of general conditions prevailing in the locality where this plant is situated, and that he gave more than a year to the careful investigation of the questions involved in this case, with the aid of the most competent expert testimony and the most minute investigation of the construction and general condition of the plant. It seems to be entirely proper to say that after such an investigation by a special master and by a judge, both resident in the general locality where the plant is situated and familiar with financial, business and general conditions there, the concurrent findings in this case should be given the greatest weight.

Respectfully submitted,

S. G. SHIELDS,
Of Counsel.

CHARLES T. CATES, JR.
J. W. CALDWELL,
R. E. L. MOUNTCASTLE.
Solicitors for Water Co.

APPENDIX "A"

AN ACT to authorize the City of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto and maintain and operate the same.

Whereas, Under and by virtue of a certain contract dated July 1, 1882, executed by the authorities of the City of Knoxville (a municipal corporation) and the Knoxville Water Company (a corporation organized under Chapter 103 of the Acts of 1877), and an ordinance of said city passed October 20, 1899, and accepted by

said Knoxville Water Company on the same day, said City of Knoxville has an option and the right to purchase all the property now owned or hereafter acquired up to the date of the purchase of said Knoxville Water Company, at a valuation to be fixed by an appraisement, if not agreed to, as provided in said contract of July 1, 1882, and carried forward and extended in the ordinance of October 20, 1899; and,

Whereas, The City of Knoxville desires to take up said option and purchase the plant and property of said Knoxville Water Company to the end that the same may be owned, operated and maintained by said city for the benefit of the people thereof,

Now, therefore, in order that said city may be enabled to purchase and acquire the plant and property of said Knoxville Water Company and build additions thereto that may be deemed necessary,

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the City of Knoxville, the corporate name of which is the Mayor and Aldermen of the City of Knoxville, be and hereby is, authorized to make the purchase of the plant and property of said Knoxville Water Company, and to make necessary extensions thereto, and for that purpose the said City of Knoxville is hereby authorized to issue bonds in such amount, number and denomination, and to run such length of time as may be determined by the Mayor and Aldermen of said city, at a rate of interest not exceeding 4 per cent, payable semi-annually, for such time as said Mayor and Aldermen of said city may determine, to enable it to acquire the plant and property of the Knox-

ville Water Company in accordance with the terms and provisions of the aforesaid contract of July 1, 1882, and the aforesaid ordinance contract of October 20, 1899.

Sec. 2. That authority is hereby conferred upon said corporate authorities of the City of Knoxville to issue such an amount of bonds as may be necesary to purchase and acquire the said plant and property of the said Knoxville Water Company upon the agreed valuation between the contracting parties, or in default of same, upon a valuation to be ascertained and fixed by appraisers in accordance with the provisions of the aforesaid contract of July 1, 1882, and the ordinance of October 20, 1899, between said city and said Water Company.

Sec. 3. That in addition to the bonds necessary to enable said city to acquire the plant and property of said Water Company, said city is hereby authorized to issue additional bonds in an amount not exceeding 10 per cent of the amount of bonds necessary to purchase said plant and property of said Water Company, to be used in making additions to said plant, including acquisition of such real estate or other property necessary in making such additions.

Sec. 4. The bonds shall be payable in gold coin of the United States, of standard weight and fineness, provided, however, that the city may either issue its own bonds in exchange for outstanding bonds of the Knoxville Water Company as part of the purchase price of said plant and property, or the said city may assume, as part of the purchase price, the bonded indebtedness now upon the plant and property of the Knoxville Water

Company, or any part thereof, in lieu of the issuance and sale of a proportionate amount of its own bonds under the power herein granted.

Sec. 5. Before notice shall be given or an appraisal had in pursuance to the contract of July 1, 1882, and the ordinance of October 20, 1899, or issuance of bonds, an election shall first be called throughout the City of Knoxville under the general laws governing municipal elections in Knox county, and if two-thirds of the qualified voters of said city voting in sad election shall vote in favor of the purchase of the property and plant of the Knoxville Water Company and the issuance of the bonds for the purposes of this Act, or exercise of other powers herein given, then the Mayor and Aldermen of the City of Knoxville shall forthwith give notice of the acceptance by the city of the option to purchase said plant, whereupon, unless the valuation of said plant is agreed upon by the contracting parties, an appraisal shall be had of all the property of the Knoxville Water Company, as provided for in the contract of July 1, 1882, and in the ordinance of October 20, 1899, after which bonds sufficient shall be issued as may be necessary under this Act for the purchase of said property and plant. The said bonds to be under the management and control of the Commissioners to be hereinafter appointed, and to be sold, if sale is necessary, at not less than par; provided, however, that the city may exercise the power herein given to assume the bonds of the Knoxville Water Company to be credited at par upon the appraisal value of said property.

Sec. 6. That the Commissioners of Election shall

furnish according to laws now existing and regulating elections in this state, tickets to be used in said election, and upon said tickets shall be printed, first, "Bonds;" second, immediately below, "No Bonds," and persons voting for the issuance of bonds and for the purchase of the property and plant of the Knoxville Water Company and for the extension of same and the other provisions of this Act, shall mark their tickets with a cross opposite the word Bonds, and those voting against the same shall in like manner mark their tickets opposite the words, No Bonds.

Sec. 7. That the Mayor and Aldermen of the City of Knoxville shall have the power of eminent domain to take and appropriate in making extensions to said plant the grounds and other real property in the same manner as are now provided for condemnation in laying out streets, etc., in sub-section 30 of section 18 of the charter of the City of Knoxville.

Sec. 8. That for the purpose of controlling, managing and operating said water plant and for the disposal of the bonds or money realized therefrom, as provided in this Act in the event of a favorable election for the issuance of bonds, as hereinbefore provided, there is created a Waterworks Commission for said city, which shall be composed of three members, all to be reputable citizens and taxpayers of the city without any other official connection with the city, and without any connection whatever with the Water Company. Said Commissioners shall be elected by the City Council at its next regular session after it has been determined that the city has voted in favor of the issuance of bonds for the

purchase of said plant, etc., by the majority herein designated.

The said Commissioners so elected shall hold for a period of one, two and three years respectively from the date of their election and qualification, and until their successors are elected and qualified.

The Mayor and Aldermen of the City of Knoxville shall have the power to fill all vacancies in said Waterworks Commission at any regular session of said Board after which vacancy occurs.

Said Commissioners shall take an oath of office to faithfully perform their duties before the City Recorder, who shall file in his office said oaths and preserve the same, and they shall likewise give bonds in such sums as the Mayor and Aldermen of the City of Knoxville may prescribe, conditioned for the faithful discharge of their duties, which bond shall likewise be filed and preserved in the office of the Recorder of said city.

Said Commissioners are forbidden to have or take any interest, direct or indirect, in any contract or transactions relative to the purchase, extension or operation of said plant.

The compensation to be paid said Commissioners shall be determined by the Mayor and Aldermen of the City of Knoxville in such sum as said authorities may deem adequate, the same to be fixed before said Commissioners are elected. Said Commissioners will elect a Chairman and Secretary, and also such clerks as may be necessary for the work to be done, and also a Treasurer

of the Commission, whose salary shall be fixed by the Mayor and Aldermen of the City of Knoxville.

The said Commission shall require of such Clerks and Treasurer an adequate bond for the faithful discharge of their duties, which bond shall be approved by the Board of Mayor and Aldermen, and shall be filed and preserved in the Recorder's office of said city.

The powers and duties of said Commissioners shall be full and ample to make all contracts for the extension of said plant or the operation and maintenance of the same, but all contracts involving an expenditure of more than five thousand dollars ($5,000), shall be reported to the City Council, and approved by it before the same shall be final. The said Commissioners shall also have the power, subject to the foregoing limitations, of making all needed repairs deemed by them necessary to the proper operation and maintenance of said plant. Upon due notice any Commissioner guilty of misconduct or misfeasance in office shall be removed by the Mayor and Aldermen of the City of Knoxville.

Sec. 9. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed January 29, 1903.

L. D. TYSON,
Speaker of the House of Representatives.

ED. T. SEAY,
Speaker of the Senate.

Approved February 2, 1903.

JAMES B. FRAZIER,
Governor.

APPENDIX "B"

AN ACT to authorize the City of Knoxville to own and operate a system of water works, and to issue bonds for that purpose, and to amend House Bill No. 28, being an Act entitled "An Act to authorize the City of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto, and maintain and operate the same," passed January 29, 1903, and approved February 2, 1903, so as to read as follows:

Section 1. *Be it enacted by the General Assembly of the State of Tennessee,* That it shall be lawful for the Mayor and Aldermen of the City of Knoxville to acquire, own and operate a system of waterworks for said City and adjacent territory, either by purchase or construction, and for that purpose it is authorized to issue its interest bearing coupon bonds to an amount not exceeding $750,000 in the manner and under the restrictions hereinafter provided.

Sec. 2. *Be it further enacted,* That said bonds shall be issued under rules, regulations and restrictions to be provided by ordinance, by the Mayor and Aldermen of said city, which bonds shall be in denomination of $1,000 each, and shall bear a rate of interest to be fixed by said ordinance, not exceeding four per cent per annum, and shall run for a period not longer than forty years, the interest on the same to be payable semi-annually on the first of January and July, respectively, said interest and

principal to be paid in gold coin of the present standard and fineness, and which said bonds shall be provided with coupons for each semi-annual interest payment, and said bonds shall be known as the "Waterworks bonds" of the City of Knoxville, and shall not be sold for less than par. No commission whatever shall be allowed for the sale of said bonds.

Sec. 3. *Be it further enacted*, That the proceeds of said bonds shall be paid into the city treasury and be there kept and preserved as a separate fund to be used exclusively for the purchase or construction of a system of waterworks for said city, and adjacent territory, and in making such alterations, extensions, additions and improvements as may be necessary, and in maintaining the same. Said bonds, and all coupons attached to said bonds, shall at maturity be and remain until fully paid, a lien on said waterworks property, appurtenances, rights, franchises and privileges, acquired by the corporate authorities of said municipality. Said lien shall include and extend to all improvements, extensions and additions which the corporate authorities of said municipality may make, and shall be in addition to the corporate liability for the payment of said bonds. Said bonds and coupons attached thereto, shall be exempt from municipal taxation.

Sec. 4. *Be it further enacted*, That there is hereby created for said City of Knoxville, a waterworks commission, to be composed of five citizens and freeholders of said city, who shall be elected by the City Council of said city, as herein provided. One member shall be elected for one year, one for two years, one for three

years, one for four years and a fifth for five years, who shall hold their office for the time for which they shall be elected and until their successors shall be elected and qualified; which successors shall each be elected at the conclusion of the several terms aforesaid for the term of five years thereafter; provided, that election to fill vacancies in said commission shall only be for the unexpired term in which the vacancy occurs. Said commissioners shall not be related to the Mayor or any member of the City Council, or any department official of said city within the fourth degree, either by affinity or consanguinity. The first Board of Commissioners shall be elected not earlier than sixty days after the passage of this Act, which election and all subsequent elections, including elections to fill vacancies, shall be upon thirty days' public notice, and at a regular meeting of said City Council.

Sec. 5. *Be it further enacted,* That before entering upon their duties said commissioners shall each file with the City Recorder a bond with solvent sureties in the penalty of one thousand dollars, payable to the State of Tennessee for the use of the City of Knoxville, conditioned that said commissioner shall honestly and faithfully perform all the duties devolving upon him as such commissioner, which bond shall be approved by the Mayor and Aldermen of said city, and said commissioners shall, before entering upon their duties, take and subscribe to the following oath:

"I, _____, do solemnly swear that, as a member of the waterworks commission of the City of Knoxville, I will honestly and faithfully perform all the duties

devolving upon me as such commissioner, and that I am not related to any of the parties forbidden by law within the prohibited degree, and that I am not, and will not become during my term of office, interested in any contracts relating to the construction or operation of said waterworks, as prohibited by law, so help me God."

Sec. 6. *Be it further enacted,* That said commissioners are hereby prohibited from having any interest, direct or indirect, in any contract in anywise relating to the construction, purchase and operation of said waterworks, and are also prohibited from awarding contracts for the construction or operation, or for any materials for use in the construction, extension and operation of said water plant, to any person or persons related to any of the members of said commission within the fourth degree, either by affinity or consanguinity, or to any member of the City Council, or to any department official of said city, or in which any such person, member or department official, or any assistant, clerk or deputy under them, has any direct or indirect interest.

Sec. 7. *Be it further enacted,* That the entire work of the supervision of the purchase or construction and operation and maintenance of said system of waterworks shall be vested in said Board of Commissioners as above provided within the limitations hereinafter provided.

Sec. 8. *Be it further enacted,* That said commissioners are authorized and directed to obtain from the Knoxville Water Company a written proposition for the sale of its plant, franchises, etc., to the City of Knoxville, giving the price and terms of payment, together with

the opinion of competent, disinterested experts as to the cost and present value of said plant; said commission is also authorized and empowered to secure plans, specifications and estimates of the cost of the construction of a new system of waterworks, and to report all matters called for in this section to said City Council for its consideration, and to accompany said report with its recommendations in the premises, which recommendations shall be accompanied with all facts, testimony and opinions upon which the same are based. Provided, that said commission shall not close any contract for the purchase or construction of waterworks until it has been duly authorized to do so by said City Council, after the proposition shall have been ratified by a vote of the people as herein provided; and provided, further, said commission shall not incur any expense in any of said matters until authorized to do so by said City Council, and until there has been appropriated out of the city treasury and placed to the credit and at the disposal of said commisison, a sufficient amount of money to cover such expense.

Sec. 9. *Be it further enacted,* That said commission shall organize by electing one of their number chairman, and by electing a secretary and treasurer, who need not be a member of said Board of Commissioners, but who, before entering upon his duties, shall execute bond in a penalty to be fixed by the Board of Mayor and Aldermen, and with good and sufficient sureties to be likewise approved by said Board. Said waterworks commissioners shall have regular meetings and may have special meetings under rules and regulations adopted by themselves. They shall keep a true and faithful record of all their

actions and proceedings, and of the waterworks plant purchased or constructed by them, and of all extensions, alterations and improvements made by them. A copy of said record on any subject, certified by said chairman and secretary, shall be evidence in the courts of this state. They shall be authorized to make contracts, employ clerks, engineers, firemen, superintendents, inspectors, water meter readers, plumbers, laborers and other persons, and purchase materials such as may be necessary in the construction or operation of said waterworks plant. They shall fix the compensation of all employes, except that of the secretary and treasurer, whose salary or compensation shall be fixed by the Board of Mayor and Aldermen. Said secretary and treasurer, when elected shall not be related to any member of said waterworks commission, or to any department official of said city within the fourth degree. They are authorized to make and enforce reasonable rules and regulations, and to fix water rates, tolls, or the price for the use of water, and they may for said purposes, enter upon premises where water is used or desired for purposes of inspection, repairs, or other work in introducing or regulating the use of water. They shall have full power to collect and enforce collections of all moneys due for the use of water or arising out of the operation of said plant. They shall also have power to grant the use of water free of charge to persons who are objects of charity and to charitable institutions. But the rules and regulations and water rates made by said commissioners shall be subject to ratification by ordinance by the Board of Mayor and Aldermen.

Sec. 10. *Be it further enacted*, That no contract

made by said waterworks commissioners in the construction, alteration or extension of said waterworks, involving more than one thousand dollars, shall be binding upon the city, until submitted to the Board of Mayor and Aldermen and approved by them.

Sec. 11. *Be it further enacted,* That said waterworks commissioners shall submit to the Board of Mayor and Aldermen at their last regular meeting in January of each year, a full detailed report of the work, income and expenditures for the preceding year, showing sources of income, items of expense, names of all salaried employes, improvements, extensions and alterations made, and such other matters as they may deem material and as the Board of Mayor and Aldermen may call for. And their report and books shall be subject to examination and correction by the Board of Mayor and Aldermen. Said report shall also contain an estimate of cost, expenses, improvements, extensions and alterations necessary for the succeeding year.

Sec. 12. *Be it further enacted,* That the Board of Mayor and Aldermen of the City of Knoxville shall have and are hereby given and granted powers of authority to determine by ordinance whether or not members of the waterworks commission shall be compensated for services rendered or shall render same without compensation, and if compensation is determined to be allowed them, then the amount of such compensation and manner and time of its payment shall be fixed by ordinance.

Sec. 13. *Be it further enacted,* That in the event it shall be determined to purchase or construct, equip and

maintain a system of waterworks by the city, then for the purpose of securing sites for pumping stations and other necessary purposes, including the laying of mains and water pipes, and sites for reservoirs and filtering galleries, extensions, improvements and alterations, the city shall have and is given the right of condemnation of grounds within and without its corporate limits, as already given in sub-section 30 of Section 18 of its charter, as well as by proper proceeding in the circuit court for Knox county, as provided by law.

Sec. 14. *Be it further enacted,* That any member of said Board of Water Works Commissioners shall be subject to removal by the Board of Mayor and Aldermen for incompetency or official misconduct, upon specific charges in writing and after due notice to the members against whom charges are made, and after trial, or opportunity for trial, before the Board of Mayor and Aldermen. But two-thirds of said Board of Mayor and Aldermen shall vote for said removal before the same can be made.

Sec. 15. *Be it further enacted,* That after said commissioners shall have made their report to the City Council as provided in Section 8 of this Act, said City Council shall call an election to be held in the said City of Knoxville by the regularly constituted authorities, after thirty (30) days' advertisement in two city papers, at which all persons legally qualified to vote for Mayor and Aldermen of said city may vote for the purpose of ascertaining the will of the people upon the following question:

First: Whether or not the City shall be authorized to issue bonds as provided in Section 1 of this Act, and

Second: To determine whether the city shall purchase the plant of the Knoxville Water Company, or construct a new water system. The election commissioners shall cause to be prepared ballots to be used and voted at said elections on which there will be printed the following:

"Vote for one"
"For Waterworks Bonds,"
"Against Waterworks Bonds,"

"Vote for one"
"For Construction of Waterworks."
"For Purchase of Waterworks."

At said election those who favor the issuance of bonds shall place a cross (X) mark opposite the words "For Waterworks Bonds," and those who oppose the issuance of bonds shall place a cross (X) mark opposite the words "Against Waterworks Bonds," and those who favor the construction of waterworks shall place a cross (X) mark opposite the words "For Construction of Waterworks," and those favoring the purchase of the Knoxville Water Company's plant shall place a cross (X) mark opposite the words "For Purchase of Waterworks."

Provided, that if said waterworks commissioners are unable to obtain from the Knoxville Water Company a written proposition for the sale of its plant, franchise, etc., to the City of Knoxville, giving the price and terms

of payment, then said election shall be held to determine whether bonds shall be issued for the construction of waterworks and the tickets shall contain only the words, "Vote for one," "For Waterworks Bonds," "Against Waterworks Bonds," and those who favor the construction of waterworks by the city shall place a cross (X) mark opposite the words "For Waterworks Bonds," and those who oppose the construction by the city, place a cross (X) mark opposite the words "Against Waterworks Bonds." Said election shall be held under existing laws and the returns shall be duly certified to the Board of Mayor and Aldermen of said city; provided, there shall also be returned to said Board of Mayor and Aldermen all the ballots voted at said election, together with one set of poll books and one set of tally sheets. The remaining poll books and tally sheets shall be filed in the office of said Commissioners of election, there to be held subject to the inspection of any citizen of said city. Provided that the election authorized by this Act may be called and held by the election commissioners of the county under the general election laws and held at any time within two years after the passage of this Act.

Provided further, that after one election has been held under this Act, no such election shall be held until the expiration of at least twenty-four months after a previous election.

Sec. 16. *Be it further enacted,* That it shall be the duty of said City Council, when it shall be convinced that two-thirds of all those voting on the question of the is-

suance of bonds have voted in favor thereof, to declare the result by ordinance, and in that event and no other, to cause said bonds to be issued as provided herein, and cause the same to be converted into cash under such rules and restrictions as it shall deem necessary to provide by ordinance. Provided, that said bonds shall not be issued until after a contract for the construction or purchase of said waterworks shall have been lawfully made and concluded.

Sec. 17. *Be it further enacted,* That said City Council shall also canvass and by ordinance declare the result of said election on the question of purchase or construction of a system of waterworks, and shall cause to be carried into effect the will of the people, as expressed at said election. Provided, that if the said Knoxville Water Company submit a written proposition as shown in section 8 of this Act, a majority of those voting on said proposition for purchase or for construction in favor of either proposition, shall be sufficient and shall decide the question.

Sec. 18. *Be it further enacted,* That the net annual income and revenues derived from the operation of the waterworks system, after payment of operating expenses, extensions and improvements, or as much thereof as shall be necessary for that purpose, shall be set apart and applied first to the payment of the interest coupons of said waterworks bonds, as such interest coupons shall mature.

Sec. 19. *Be it further enacted,* That all laws and parts of laws in conflict with this Act are hereby repealed,

and that this Act take effect from and after its passage, the public welfare requiring it.

Passed March 31, 1903.

ED. T. SEAY,
Speaker of the Senate.

L. D. TYSON,
Speaker of the House of Representatives.

Approved April 3, 1903.

JAMES B. FRAZIER,
Governor.

APPENDIX C.

Value of Water Company's Entire Plant and Property, on March 31, 1901, as found by the Special Master $608,427.95

(*Printed Record, p.* 171-175.)

Fair Value of the plant at that time, in use for the purpose of supplying the city proper, as found by the Special Master, being 93.83 per cent. of entire plant..... 570,887.35

(*Printed Record, p.* 181.)

Gross Revenue derived by Water Company from its entire plant and property under the rates in effect prior to March 30, 1901. as found by the Special Master for the year ending March 31, 1901..... 88,481.39

(*Printed Record, p.* 181.)

Revenue to be derived under the Ordinance of March 30, 1901, for the same period, as found by the Special Master..... 70,857.75

(*Printed Record, p.* 181.)

Revenue derived from water supplied within the corporate limits, under rates in effect prior to March 30, 1901, for business year ending on that date, as found by the Special Master 78,148.31

(*Printed Record, p.* 182.)

Revenue to be derived under the Ordiance of March 30, 1901, within the *corporate limits* for the same period, as found by the Special Master (No Reduction on Hydrant Rentals) 63,342.40

(*Printed Record, p.* 182.)

Expenses of complainant in operating its entire plant for the year ending March 31, 1901, as found by the Special Master..... 34,750.91

(*Printed Record, p.* 183.)

Expenses of complainant in operating that portion of its plant within the city proper, as found by the Special Master..... 32,809.98

(*Printed Record, p.* 183.)

From the above it appears that the *net income,* to be derived from the *entire plant,* under the operations of the Ordinance of March 30, 1901, is $70,857.75—$34,750.91 or..... 36,106.84

And the net income to be derived from that portion of the plant within the corporate limits, under the operations of the Ordinance of March 30, 1901, is	
$63,342.40—$32,809.98 or	30,532.42
Therefore applying the *Net Income* of the *entire* plant under the operations of the ordinance of March 31, 1901, to the *ascertained value* of the *entire plant* as above, we have $36,106.84×100—$608,427.95, or a per cent. of income of	5.94
Applying the *Net Income* to be derived from the operation of the ordinance of March 30, 1901, and from that portion of the plant within the corporate limits, to the ascertained value of that portion of the entire plant in use for the purpose of supplying the city proper, we have $30,542.32×100—$570,887.95, or a total per cent. of income of	5.35
The Special Master finds that 2 per cent. per annum is a fair allowance for depreciation.	
(*Printed Record*, p. 187.)	
Deducting the 2 per cent. allowance for depreciation, it leaves as the net return to be realized upon the *entire plant*, by aid of the entire net income of the Company, under the operations of the Ordinance of March 30, 1901	3.94

And the net return to be realized upon that portion of the plant used in supplying water within the corporate limits of the City of Knoxville, by aid of the entire net income collected from within the city limits under the operation of the Ordinance of March 31, 1901, as 3.35

APPENDIX D.

Effect of applying the Ordinance of March 30, 1901, to the business of the Water Company for the year subsequent to the passage of said Ordinance. The application of the Income and expenses for the year ending March 31, 1902, to the fair value of the plant in use for supplying the city with water, must of necessity carry with it the fair value of the plant at the date the ordinance is to be tested by. The Special Master does not find this value at any other date than that of March 31, 1901. The city offers very little proof as to values later than the date of the Ordinance. The Water Company introduces, by its President and Supervising Engineer, an estimate of "Additions to March 31, 1902," (from March 31, 1901 (amounting to..... 73,486.11

(*Printed Record, p.* 645.)

He also submits an estimate of "Additions, 6 mos. to Sept. 30, 1902," amounting to.... 26,907.51

(*Printed Record, p.* 645.)

The Treasurer of the Water Company gives in a table showing the yearly additions to the construction cost, for the year ending March 31, 1902, an amount of 79,281.31

(*Printed Record, p.* 727.)

One way of obtaining the fair value, as of March 31, 1902, would be by taking the amount found by the Special Master as the fair value of the entire plant as of March 31, 1901..... 608,428.00

(*Printed Record, p.* 175.)

To which add the estimated net cost of extensions for the year ending March 31, 1902, by William Wheeler, as above..... 73,486.00

(*Printed Record, p.* 645.)

Would give an indication of the fair value, March 31, 1902, as..... 681,914.00

If the actual book construction cost during this year, of 79,281.00

(*Printed Record, p.* 727.)

is added to the Special Master's findings of fair value for the preceding year, it would give the fair value, as of March 31, 1902 ..... 687,709.00

An objection to using either of these methods is that the Special Master's estimate of fair value as of March 31, 1901, is of necessity based upon the ruling prices as of that

date. Price of Cast Iron Pipe, the largest factor in water works construction, was "at one of the lowest notches it has reached in a long time" on March 31, 1901,

(*Printed Record, p.* 1,977.)

and "since this case has been under discussion the price has gone as high as $32.75 (from $24.00 March 31, 1901) from that date of March 31, to the present day" (Jan. 5, 1904). It attained that price about September 30, 1902.

(*Printed Record, p.* 1,977.)

Price of Cast Iron Pipe, on March 31, 1902, as shown by diagram giving prices of Cast Iron Pipe covering a series of years, is given at about $27.00 per ton.

(*Printed Record, p.* 2,062.)

It can therefore be readily seen that no comparison, made upon the Special Master's report of value, as of March 31, 1901, would produce a fair value of the plant as of March 31, 1902, unless the increase in the value of labor and material is also considered.

J. L. Ludlow made an estimate of the "Cost of Building Works of the Knoxville Water Company as of Sept. 30, 1902," amounting to 740,068.00

but disregarding certain items of Real Estate, Office Fixtures, Supplies on hand as well as certain Contractor's Profits.

(*Printed Record, p.* 941.)

If from this we deduct William Wheeler's estimate of "Additions," 6 mos. to Sept. 30, 1902," 26,908.00

(*Printed Record, p.* 645.)

It would leave as the fair value as of March 31, 1902 ..... 713,160.00

This amount probably is high, as Cast Iron Pipe is estimated in Mr. Ludlow's values at $32.00 per ton, the price in September, 1902, instead of at $27.00, the price in March, 1902, but on the other hand certain material items are left out which would still further enhance its value.

Arthur Hider made an "Estimate of the Cost of Duplicating the Knoxville Water Company's Plant as it existed September 30, 1902," amounting to 799,389.00

(*Printed Record, p.* 991.)

He used as an average price of Cast Iron Pipe, $31.57 per ton,

(*Printed Record, p.* 989.)

Deducting the "Additions, 6 mos. to Sept. 30, 1902," 26,908.00

Leaves as his Value, without Real Estate, of.. 772,481.00

T. T. Johnson made an Estimate "Knoxville Water Works Plant, Sept. 30, 1902," but not including Real Estate or Stock on Hand, and amounting to 808,733.00

(*Printed Record, p.* 1,013.)

Deducting the "Additions, 6 mos. to Sept. 30, 1902," 26,908.00

Leaves as his fair value without Real Estate or Stock on Hand as of March 31, 1902... 781,825.00

He uses $32.00 per ton as the price of Cast Iron Pipe.

(*Printed Record, p.* 1,013.)

William Wheeler also made an "Estimated Cost of Replacement of the Physical Plant and Property which was in use September 30, 1902," which included Real Estate, Stock and Supplies on Hand, etc., left out of the other replacement estimates, as of that date, and with pipe at prices ranging from $36.60 for 3-inch to $31.00 for 10-inch to 20-inch pipe per ton, reached a value of 819,487.00

(*Printed Record, p.* 670.)

Deducting the "Additions, 6 mos. to Sept. 30, 1902," 26,908.00

Leaves as the fair value as of March 31, 1902, 792,579.00

As this includes all the elements of the Plant and Property, it may be nearer the fair value as of the dates in question than are the others.

The fair value of the entire Plant in use as of March 31, 1902, would therefore appear to be, from the above, somewhere between $681,914.00, the lowest of these determinations, and $792,579.00, the highest. For the purposes of this calculation and for conservative reasons, but without admitting it as a fact, adopt as the fair valuation as of March 31, 1902, ... 685,000.00

And further, still for lack of a finding by the Special Master on these points, taking the evidence of the Treasurer, as to the "Annual Income on Basis of Ordinance of March 31, 1901," for the fiscal year ending March 31, 1902, ... 76,233.58

(*Printed Record, p.* 716.)

And likewise his estimate of "Expenses in same period, entire plant," 37,003.25

(*Printed Record, p.* 716.)

It would leave a net income due to the entire plant, of 39,230.33

Applying this net income to the value above deduced, we have, 39,230.33×100—685.000.00=5.73%

From which, after deducting 2 per cent. allowance for depreciation, as found by the Special Master

(*Printed Record, p.* 187.)

leaves as a net return upon the fair value of the Plant, as of March 31, 1902, based upon the operations of the Ordinance of March 31, 1901, of 3.73%

Again, dealing only with the Plant and Property within the city proper, and applying to the above deduced value of $685,000 the percentage found by the Special Master, of the entire plant of the Water Company, used in supplying the city proper, to-wit, 93.83%

(*Printed Record, p.* 181.)

we have, as the value on March 31, 1902, of the plant and property of the Water Company, used in supplying the city proper.. 642,735.00

From the Treasurer's statement of Income and expenses for the Fiscal year ending March 31, 1902, we find,

(*Printed Record, p.* 716.)

City proper, collections, per city ordinance	65,574.05
Expenses in same period, city proper....	34,962.02

Leaving as net income, city proper, under operations of city ordinance of March 30, 1901 ..... 30,612.03

Applying this net income to the above deduced value of the Plant and Property within the city, we have, ...30,612.03×100—642,735.00=4.77%

From which, after deducting 2 per cent. as above, allowance for depreciation, as found by the Special Master, leaves a net return upon the value of the plant, as used to supply the city proper, as of March 31, 1902, based upon the operations of the ordinance of March 31, 1901, of 2.77%

The above is, for lack of evidence in the record, of material facts, not conclusive, in fact the valuation used, being substantially based upon the low prices of 1901, is below any real value that would in all probability be placed upon the Plant as of March 31, 1902, Other considerations also entering into the calculations, not having been judicially passed upon, make the conclusions at best, only an approximation. It is,however, we think, well within the results which would be ascertained by a thorough examination of the questions involved, for any increase in the value of the Plant, either taken as a whole, or as applying to the city proper, would result in proportionately decreasing the per cent. of net return to be obtained therefrom.

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No. 17

IN THE

SUPREME COURT OF THE UNITED

MAYOR AND ALDERMEN OF THE CITY
KNOXVILLE, APPELLANT

v.

KNOXVILLE WATER COMPANY, APPE

APPEALED FROM THE CIRCUIT COURT OF
STATES FOR THE EASTERN DISTRICT OF

REPLY OF APPELLANT TO THE ARGU
HERE FILED BY THE APPELLE

J. [illegible]
Att

E. [illegible]
W. K. TURNER,
W. T. [illegible]
Of Counsel

(20,554).

In the Supreme Court of the United States,

No. 217.

MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, APPELLANT,

vs.

KNOXVILLE WATER COMPANY, APPELLEE

APPEALED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSFE

REPLY BY APPELLANT TO THE ADDITIONAL BRIEF FILED BY THE APPFLLEE

I

REPLY TO CONTENTION THAT ORDINANCE IS INVALID BY REASON OF ITS EXCESSIVE PENALTIES

The contention of the appellee, made for the first time on the oral argument of this cause in this Court, and now reinforced by an "additional brief", to which this is a reply, to-wit, that appellant's ordinance of March 30, 1901, regulating the appellee's water rates is "unconstitutional

and void because by reason of the excessive penalties imposed thereby it operated as a practical denial to the appellee Water Company of the equal protection of the laws", is clearly untenable upon this record for several reasons. There is no distinct averment in the bill that said ordinance was void upon its face for this reason. The two clauses quoted from the bill on page 3 of the "additional brief" do not and were not intended by the pleader to raise this special question for adjudication as will clearly appear by reading those clauses in connection with the other portions of the bill. Before the bill in this case was filed, the case of the Knoxville Water Co. vs. the Mayor and Alderman of the City of Knoxville, which was a suit by the City to recover of the Water Company the penalty prescribed for violation of this ordinance of March 30, 1901, had been finally decided by the Supreme Court of Tennessee in favor of the City of Knoxville, and the Water Company had prosecuted writ of error to this Court, which was then pending for argument and determination. These facts are averred in the bill in this case, and the hope expressed therein that the Water Company would secure a reversal of the judgement of the Supreme Court of Tennessee in this Court, and a decree declaring said ordinance null and void.

Printed Record, Vol. 1, *page* 9, 10, 16, 17.

The prosecution of that suit by writ of error in this Court was excepted from the injunction prayed in this case.

Printed Record, Vol. 1, *page* 17.

There can be no doubt that the identical question sought to be made by the appellee in the oral argument and in this "Additional Brief" was distinctly and unmistakably made and fully considered and decided both by the Supreme Court of the State of Tennessee and by this Court in said case, involving the recovery of a penalty for the breach of said ordinance. That case could not have been decided in favor of the City, as it was by both courts, without an affirmance of the validity of the ordinance. It was agreed by written stipulation that the decision of the Supreme Court of Tennessee was affirmed by this Court after the bill was filed in this case.

> See Appellee's Original Brief, page 13 and 14, referring to printed record in Cause No. 212 of this Court, a printed copy of which record is filed for the convenient reference of the Court with this brief. The stipulation in reference to this matter will be found on page 2250 of the printed record.
>
> See also stipulation as to use of record in Cause 212 (18354) on page 1946-1[illegible]3 of printed record.

The appellant in its answer in this case pleads and relies upon the decision of the Supreme Court of Tennessee in said former case, which was then in full force and effect, and which has been affirmed by this Court. That decision was relied upon, not only as *res adjudicata* as to the valadity of the ordinance in question, but when affirmed by this court, as the settled law affecting this case and ordinance so far as that law could be made certain by the decision of both courts.

Printed Record, Vol. 1, 88-91.

By examination of the record of Case No. 212 (18,354) decided by this Court, it will be found that the Water Company raised by written plea, among others, this identical question, averring that

> "Said ordinance of March 30, 1901, is further oppressive and unreasonable, because, under its terms and provisions, defendant will be deprived of its property and liberty without due process of law. Wherefore said ordinance is void, and not enforceable against this defendant."

And further averring in another distict plea, that

> "Said ordinance of March 30, 1901, is excessive and repugnant to the Constitution of the State of Tennessee and the United States, in that it permits plaintiff to arbitrarily asses against the defendant a penalty of $50.00 for every charge, demand and collection by defendant from the consumers of water furnished by it in excess of the schedule of rates prescribed in the first section of said ordinance." etc.

Printed Record (212), *pages* 3-5.

There were other pleas denying the validity of this ordinance upon other and every conceivable ground.

In its reply brief in the Supreme Court of the State, the appellee insisted upon the invalidity of said ordinance as follows, to-wit:

> "That said ordinance is oppressive and unreasonable in that, * * * * * * *
>
> 5th. That the penalty prescribed by said ordinance is excessive."

Record (212), *pages* 138, 157, 178.

The Supreme Court of the State determined that,

> "The ordinance of March 30, 1901, upon which this suit is based, is not in contravention or violation of the Constitution of the United States, Article I, Section 10, or of Section 1 of the 14th Amendment of said Constitution, but that said ordinance is a valid and legal ordinance, and was properly passed under the power and authority invested in plaintiff." etc.

And judgment was entered accordingly in favor of the City, and the Water Company saved exceptions to the ruling of the Court to the effect that the ordinance was not in contravention or violation of the Constitution of the United States.

Record (*No.* 212), *pages* 228-230.

There was a reservation in the opinion and judgment of the Supreme Court of the State of a right to the Water Company "to litigate and show in such way as it may be advised that the *rates prescribed by said ordinance of March* 30, 1901, *are unreasonable and oppressive*—that question not having been considered by the Court in deciding this case." This reservation was not as to the *validity of the ordinance on its face*, but as to the *reasonablesness of the rates* that it prescribed.

The assignment of errors by the Water Company, upon which said cause was brought to this Court on writ of error was as follows, to-wit:

> "The defendant, Knoxville Water Company, by its attorney further excepts to the action and judgment of the Supreme Court of the State of Tennessee sustaining the validity of the ordinance

of plaintiff passed March 30, 1901, being the ordinance in controversy in this cause, and holding that the same is in contravention and violation of the Constitution of the United States, Article 1, Section 1, and Section 1 of the XIV Amendment of said Constitution as contended by defendant in its pleas, in its reply to plaintiff's assignment of errors to the Supreme Court of Tennessee, and in the oral argument of its counsel before said Supreme Court, all of which defendant assigns as error upon said julgment."

Record (*No.* 212), *page* 230.
Printed Record Vol. 1, 283.

On the 23d of March, 1903, this Court affirmed in all respects the judgment of the Supreme Court of Tennessee, thereby overruling said assignment of error and affirming the validity of said ordiance.

Knoxville Water Co. vs. The City of Knoxvillee,
189 *U. S.*, 434;
47*L. ed.*, 887.

The opinion and judgment of the Supreme Court of Tennessee, which were thus approved and affirmed by this Court had in express terms considered the objection now made to said ordinance and overruled the same, and affirmed the validity of the ordinance. In its opinion, the Supreme Court of Tennessee said:

"The rates adopted by the ordinance are not shown by the proof to be unreasonable, and the ordinance is not shown to be oppressive, and its violation subjects the defendant to the penalties imposed."

Printed Record, 247, 267;
Knoxville Water Co. vs. Knoxville,
107 *Tenn.*, 647.

The language, equally explicit, of the judgment of the Supreme Court of Tennessee has already been quoted as well as that of the assignment of errors.

It becomes apparent from this statement of facts why the question under discussion was not made in the lower court and is presented for the first time in this Court on the oral argument of the case. The bill shows that the Water Company contemplated this question would be settled and settled finally between itself and the City by the decision that should be rendered on the writ of error prosecuted to this Court to reverse the decision, in the former case, of the Supreme Court of Tennessee. The City relied upon the decision in its answer as an adjudication as well as a settlement of the law of the case unless the same should be reversed by this Court. It is stipulated distinctly that the decision of the Supreme Court of the State of Tennessee was affirmed, and it was never thought or suggested by either party that the question now presented on the oral argument and by this "Additional Brief' was any longer in controversy between the parties. It did not occur to appellee's counsel that it could possibly be involved until after the preparation of their original brief in this case. There was no decision of this question invoked in the lower court, and no exception on that account made.

It is a most significant fact that the Water Company on the 15th of May, 1902, about seventeen months after the filing of its bill in this case, applied to the lower court by petition to have the proceedings in this case stayed until a decision should be reached in the former case. This petition avers the pendency of the former case on writ of error in this Court, and avers further that it involves the

identical question which it is sought now to raise in this Court, and prayed for an order staying further proceedings in this case "until the final determination of the suit between the Mayor and Aldermen of the City of Knoxville and the Knoxville Water Company now pending in the Supreme Court of the United States above referred to." etc.

The reason for the granting of this stay order is thus stated in the petition:

> "Petitioner is advised and respectfully avers, that before this Court would or ought to order a reference in this cause to determine the question of the reasonableness of the rates prescribed by said ordinance, it must first be determined by Your Honors in this cause, or upon a proper proceeding in some other forum having jurisdiction, whether or not the contention which is now made herein and is also made in said suit in the Supreme Court of the United States, to-wit, whether or not the defendant, The Mayor and Aldermen, had power under the circumstances to pass said ordinance is well taken. Said question of the power of the defendant to pass the ordinances was pending in said suit in the Supreme Court of the United States before the bill was filed in this cause, and is still before that Court for determination; and the decision which may be reached in the Supreme Court in regard thereto, *must, of course, be controlling in this case.* Petitioner again averring, that *said question now before the Supreme Court is fundamental and controlling in the entire controversy between the parties to this suit,* says, that if that case should be decided in petitioner's favor, as petitioner believes it will be decided, in view of the many decisions of that Court, one being the recent decision in the Detroit,

Michigan, Street Railway cases, then the determination of the question of the reasonableness of the water rates raised in this cause would become wholly immaterial. In other words, if the Supreme Court of the United States should hold that said Mayor and Aldermen had *no power*, in view of the existence of contracts between it and petitioner, or *for any other reason*, to pass said ordinance of March 30, 1901, or said subsequent ordinance, there can be no reason for inquiring as to the reasonableness of the rates prescribed in said ordiance. Petitioner is advised and says, that it is the fixed practice of Federal Courts, where two causes are pending in different courts and between the same parties, *that the decision of the one first instituted will be conclusive of the second* to stay proceedings in the second until the first shall have been determined, and petitioner believes that all the reasons,—or all the important reasons,—which support this well established practice exists in this instance. And it is advised that the Court has the power, and prays that it will exercise the same, to stay the present proceedings until the termination of said supreme case. If petitioner should fail in the Supreme Court, then the present cause can proceed after the delay of about eight months. If petitioner should succeed therein, then the bill before this Court would become unnecessary."

Printed Record, Vol. 1, *p.* 108-113.

It was the opinion of appellee's counsel before the decision of this Court upon said writ of error that the decision, when made "must, of course, be controlling in this case." Appellee's counsel seemed to have been of the same

opinion after the decision upon the writ of error until the question now insisted upon was sprung on the oral argument of this cause in this Court for the first time.

It is seldom that a case or a question of law has received at the hands of the courts a more thorough consideration than has this question of the validity of this City ordinance upon its face. If opinions and adjudication of courts can put a question at rest at all this question ought to be treated as a settled one in the present suit.

The single reservation made in the opinion and judgment of the Supreme Court of Tennessee was the right of the Water Company to litigate and show by evidence that the *rates* prescribed were *unreasonable*. The question of the invalidity of the ordinance upon its face was not reserved, and the Courts would probably not have permitted the reservation of such a question. The Court necessarily determined the validity of the ordinance on its face. Unless the Court decided this question they decided nothing in the protracted litigation over the ordinance. The counsel for appellee were induced to raise this question at this time by the decisions of this Court in the cases of

Ex Parte Young,
209 *U. S.*, 448; *and*
Hunter vs. Wood,
209 *U. S.*, 472.

We submit, that the legislation considered in those cases was not of the same character as the ordinance involved in this case. The penalties prescribed by the legislation considered in those cases were extreme in amount and severity and were cumulative for the most part. The

principle applied in those cases is stated in the majority opinion as follows:

> "It may therefore be said that when the penalties for disobedience are by fine so enormous and imprisonment so severe as to intimidate the Company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the Company from seeking judicial construction of laws which deeply affect its rights."
>
> *Page* 449.

In the case at bar, the ordiance prescribes a penalty of "not less than $10.00 nor more than $50.00 for each offence." If this very moderate penalty for the violation of a City ordinance regulating water rates renders the ordinance void, then it will not be possible for the City to prescribe any penalty for violation of its ordinance. The penalty here prescribed is one that is common to nearly all classes of misdemeanor or small offences. This penalty is not made cumulative by the ordiance. It is true that one choosing to persistently and continuously violate the ordiance may bring upon himself very serious consequences, but this is true of any offender who chooses to violate rather than to obey the laws of the land. A citizen, by persistently uttering oaths in public places, can bring upon himself an immense and ruinous accumulation and burden of fines and costs, just as this Company, by persisting in repeated violations of a very reasonable ordinance may bring like consequences upon itself.

The public are entitled to at least equal consideration with this Water Company. The City, representing the

public gave this Water Company the fullest hearing upon the question of the reasonableness of the rate fixed before establishing that rate. The Water Company showed scant courtesy to the City Authorities. It refused such assistance as it could have rendered and in good faith should have rendered to the City Authorities in arriving at a just conclusion as to rates. The City Authorities used great diligence in establishing the rates in question and reached a surprisingly just result. This Water Company has not been deprived of a hearing, and that is the distinct ground upon which excessive and cumulative penalties are held to render legislation of this character void.

After this ordinance was passed, the City and its inhabitants showed no disposition to oppress this Company. The Water Company, for eight months, ignored and daily violated the ordinance, and yet encountered only enough of suits for penalties to bring about a settlement of the controverted question of the validity of the ordiance. During this eight months, there was no injunction against suits. No frivolous or oppressive litigation was instituted. Although this ordiance has been passed and should have been in force for more than seven years, only one suit, in which a penalty of $10.00 was inflicted, has been prosecuted to a final result against the Water Company. It has been able to arrest the enforcement of this ordinance and the bringing and prosecution of all suits looking to that end for the term of more than seven years. It has litigated the questions by piecemeal and thereby secured this extraordinary delay. Certainly it cannot be reasonably contended that an ordinance which can be thus arrested and evaded for such a term of years is one that should be declared void for

the severity of its penalties. Surely this Water Company has not by this ordinance been deterred from appealing repeatedly to the Courts, or deprived of the right to have full and repeated hearings, extending over seven years. On this question, we call the Court's attention to the opinion in the case of

San Diego L. & T. Co. vs. National City,
174 *U. S.*, 739;
43 *L. Ed.*, 1155.

If therefore the question of the invalidity of this ordinance upon its face was an open one in this case, it should be resolved in favor of the validity of the ordinance. There can be no serious loss or peril to result to a corporation from the putting into effect for a brief period and as a test of an ordinance such as the one involved in this case, where the ordinance, as was done in this case, is passed after due notice to the corporation and full hearing, and after an exhaustive examination as to its reasonableness. There can be scarcely any satisfactory answer as to the reasonableness of such ordinance except an actual test for some period of the results of operations under the ordinance. Some of the courts have required such test to be made before undertaking to enjoin the enforcement of the legislation.

II

CORRECTION OF ERROR AS TO INCOME IN APPELLANT'S FORMER BRIEF.

The presentation of this reply brief affords counsel for the City an opportunity, of which they will avail themselves, to correct an error,—or rather errors,—contained

in their original brief in relation to the estimated income of the Water Company under the ordinance and the per cent that such income would pay upon the value of the Water Company's plant. This error occurs in the original brief as to the year 1900-1, on pages 112, 113, and as to the year 1901-2 on pages 154 and 155. There is and can be no controversy but that the ordinance of March 30, 1901, a copy of which is made Exhibit No. 7 to the bill, and found on pages 64-68 of Volume 1 of the printed record, affects and reduces only the rates of water consumers who are inhabitants of the City. It does not reduce or in any way affect hydrant rentals, amounting to $11,455.00, due from the City to the Water Company. It does not reduce or in any way affect the rates of water consumers who are not inhabitants of the City of Knoxville. The City's scheme of regulation it seems contmplated reduction of water rates only to the inhabitants of the City, leaving, for obvious reasons and equitable considerations, the rates of water consumers living outside of the City unchanged. In the calculations submitted in appellant's former brief as to the year 1900-1, and found on pages 112, 113 the estimated income under City ordinance rates for that year were placed upon authority of the Water Company's Treasurer, at $70,857.75. A simple calculations will show that this is too small by the amount of $2,364.28,—an amount which would increase the percents that estimated income under the ordinance would pay upon the values of the plant found on page 113 of brief by nearly four-tenths of one per cent. The statement of Elbert Wheeler, the Treasurer of the Water Company, as to this year will be found on page 713, Vol. 1, of the printed record, and a calculation will show that after deducting the hydrant rental from actual water

collections of that year, the Treasurer proceeded to reduce the entire balance realized from fixtures and meters, to-wit, $77,026.39 by 22.88 percent. In a subsequent portion of this statement, it appears that $10,333.08 of this balance was realized from fixtures and meters outside of the City, and no reduction of 22.88 per cent should have been made on this sum, as was done by the Treasurer in getting at the result of $70,857.75. There was no reduction on the fixtures anl meters rates outside of the City, and none should have been made by the Treasurer in his estimate of the revenue that would have been produced under the City ordinance. The latter part of the Treasurer's calculation shows that only $66,693.31 of this year's revenue arose from fixtures and meters within the City, and this sum only was therefore subject to reduction under the ordinance. The excessive rduction on account of the $10,333.08, which, under the ordinance, was subject to no reduction, having been raelized fro fixtures and meters outside of the City, amounts to the above sum of $2,364.28. This sum should be added to the $70,857.75 to get the revenue realizable under the ordinance according to the Treasurer's own theory.

The mistake as to the year 1901-2 is larger in amount than for the preceding year. The Treasurer's statement as to this year will be found on page 716 of Volume 1 of printed record. The estimated annual income on the basis of the ordinance as fixed by the Treasurer for this year, and as adopted in our former brief, is $76,233.58. This sum is arrived at by the Treasurer by deducting from actual water collections, first, hydrant rentals, $11,455.00, which were not reduced by the ordinance, and secondly

22.88 per cent of the entire balance of $83,997.12 realized from fixtures and meters. This sum included all revenues from fixtures and meters both inside and *outside* the City, This same statement shows that there was realized from fixtures and meters outside of the City $14,435.36, and the Treasurer's reduction of 22.88 per cent on this amount is erroneous, and the sum of this erroneous reduction, to-wit, $3,292.72, should be added to the $76,233.58 in order to get the correct estimated amount realizable under the ordinance, which would increase the per cent that income of this year would pay on value of plant by about fifty-five hundredths of one per cent. These errors also enter into estimates made in appellee's brief.

All of which is respectfully submitted.

J. PIKE POWERS,
City Attorney.

G. W. PICKLE,
W. R. TURNER,
W. T. KENNERLY,
Of Counsel.

(20,554)

IN THE

Supreme Court of the United States

No. 217

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE,
APPELLANT,
VS.
THE KNOXVILLE WATER COMPANY,
APPELLEE.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

ADDITIONAL BRIEF FOR THE KNOXVILLE WATER COMPANY.

May it please your Honors:

This case was heard by this Honorable Court in April and in the oral argument of counsel for appellee it was insisted that the ordinance assuming to regulate the rates charged by appellee was unconstitutional and void because, by reason of the excessive penalties imposed thereby, it operated as a prac-

tical denial to the appellee Water Company of the equal protection of the laws. This point was not presented to your Honors in the original brief sumbitted on behalf of appellee, because the same was prepared prior to your Honor's decision in Ex Parte Young (the Minnesota Rate Case) and the companion case of Hunter, Sheriff, vs. J. H. Wood (the North Carolina Rate Case), and now on account of the lapse of time since the oral argument, it is deemed proper to present the substance of said argument on this point, with citations from the record sustaining the same, in the way of an additional brief.

Now, therefore, we respectfully submit that the decision of this Court in ex parte Young is controlling against the validity of the ordinance attacked by appellee in this case, on the ground that the penalties provided by the ordinance in question for violation of its provisions are so drastic and excessive that the Water Company is denied the equal protection of the laws, in that it is either compelled to acquiesce in the confiscatory rates prescribed by the City or subject itself to confiscatory penalties if it violates the provisions of said ordinance and appeals to the courts for protection. Either course means ruin to the property of appellee. We will now briefly refer to the pleadings and record pertinent to this point.

It was averred in the original bill filed by the appellee in the United States Circuit Court below, after setting out the terms of said ordinance, as follows:

"And now your orator shows that it is informed and so charges that it is the declared purpose of the defendant within the near future and without regard to the pendency of the aforesaid cause in the Supreme Court of the United States, to institute a large number of suits and criminal prosecutions against your orator to compel it to obey the aforesaid unjust, unreasonable and illegal ordinance, and by reason of the excessive penalties therein provided, replenish the depleted treasury of defendant. * * A number of consumers of water have paid their bills under protest and your orator is informed that when the next payment becomes due a larger number will so pay their bills, either with a view of suing your orator for the difference between your orator's present just and reasonable rates and those fixed by the aforesaid unreasonable and illegal ordinance, or enforcing against your orator the harsh and unreasonable penalties provided under said ordinance."

"Your orator further charges that, if its consumers and defendant are permitted to institute the suits they are prepareing to have instituted against your orator, the defense of said suits will entail a grievous burden of expense upon your orator; that the existence of said illegal ordinance operates as a constant menace and disturbance against your orator's business, and to its rights to charge and collect its reasonable rates, and the income necessary to hold and save its property and franchises; that if it is compelled to furnish water at the rates fixed by said illegal ordinances, your orator fears that it will be driven to insolvency, default on its indebtedness and loss of its property and franchises."

Printed Record, Vol. 1, pp. 16, 17.

The penalty clause of the ordinance in question is contained in section 3 and is as follows:

"Be it further ordained, That it shall be unlawful for any person, company, firm or corporation, or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville, to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in section 1 of this ordinance, and it shall also be *unlawful for any person, firm or corporation, or other officers, agents, servants or employees* to cut off or otherwise interfere with the supply, or *refuse to furnish a supply of water to any consumer* for failure to pay for same, provided such consumer tenders in lawful money the charge for such water at the rates aforesaid, and any violation of the provision of this section of this ordinance shall be a misdemeanor, and upon conviction thereof before the recorder, the offender shall be *punishable by a fine of not less than Ten Dollars nor more than Fifty Dollars for each offence.*"

Printed Record, vol. 1, pp. 67, 68.

It is stated in the Minnesota case that, "the sale of each ticket above the price permitted by the Act would be a violation thereof." So also with respect to this ordinance, any bill collected above the rate required by said ordinance is a violation of said ordinance and is made a misdemeanor that subjects the company, upon such charge, to a fine of not less than $10.00 nor more than $50.00 for each offence; and also imposes the same penalty upon every officer, agent, servant or employee

of the company who charges and collects, or for failure to pay, cuts off the water supply to the same extent.

Now the number of services approximately in the Knoxville water plant on March 31, 1901, when said ordinance took effect, was forty-five hundred.

Printed Record, vol. 1, p. 745.

Therefore, for one month's violation of the ordinance in question, by the terms thereof, the Knoxville Water Company, if fined only the lowest fine of $10.00, was capable of being mulcted in the sum of $45,000.00; or at $50.00, in the sum of $225,000.00 for one month and for two months the sum of $450,000.00. If two months should elapse and said law be violated, the company would make itself liable for approximately $500,000.00, nearly two-thirds of the value of its entire plant, according to the valuation fixed by the Court and the Master herein; and at the same time, as to each of said offences, some officer or officers of the company were likewise subject to a penalty for an equal amount, it thus being within the power of the city, by the enforcement of the terms of its own ordinances, to virtually confiscate all of the property of the appellee company in two or three months time, if said company chose to violate said Act. This was the power vested in the statutes of the State of Minnesota and of the State of North Carolina, which destroyed said statutes under the Minnesota and North Carolina cases above referred to.

Section 6 of the Act of the 18th of April, 1907, passed by the Legislature of Minnesota, directed, as stated by this Court:

"That every railroad company in the State should adopt and publish and put into effect the rates specified in the statute, and that every officer, director, traffic manager or agent or employee of such railroad company should cause the adoption, publication and use by such railroad company of rates not exceeding those specified in the Act, and that 'any officer, director, or such agent or employee of any such railroad company who violates any of the provisions of this section or who causes or counsels, advises or assists, any such railroad company to violate any of the provisions of this section, shall be guilty of a misdemeanor and may be prosecuted therefor in any court into which its railroad extends and in which it has a station, and upon conviction thereof be punished by imprisonment in the county jail for a period of not exceeding 90 days.' "

And the penalty of another Act attacked, which was the two cents a mile passenger rate Act passed on the 4th of April, 1907, provided:

"That any railroad company, or any officer, agent or representative thereof, who shall violate any provision of this Act, shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand dollars ($5000.00), or by imprisonment in the State prison for a period not exceeding five years, or both such fine and imprisonment."

In discussing said Act and the penalties provided, this Court said:

"Another Federal question is the alleged unconstitutionality of these Acts because of the enormous penalties denounced for their violation, which prevent the railroad company, as alleged, or any of its servants or employees from resorting to the courts for the purpose of determining the validity of such Acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the Acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties resulting in the possible confiscation of its whole property, that rather than take such a risk, the company would obey the laws, although such obedience might also result, in the end, though by a slower process, in such confiscation."

"The sale of each ticket above the price permitted by the Act would be a violation thereof. * * The Company, in order to test the validity of the Acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts, either State or Federal, for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the Acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be the denial of any hearing to the company."

The court then quotes from an opinion handed down by

Mr. Justice Brewer for this Court in the case of Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79, wherein it is said at p. 100:

"Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that, upon a failure to make good that claim or defence, the penalty of such failure either appropriates all of his property or subjects him to extravagant and unreasonable loss?"

And from p. 102, as follows:

"It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed *only after there has been a final determination of the validity of the statute*, the question would be very different from that here presented. But when the legislature in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

The question thus reserved by the Supreme Court in the Cotting case is the question directly passed upon by the Court in the Minnesota and North Carolina cases as against the validity of Acts containing such penalties.

209 U. S., p. 448.

The penalty in the North Carolina statute was $500.00 for each violation, payable to the person aggrieved, and that any agent, servant, etc., of the company should be guilty of a misdemeanor to be punished by fine or imprisonment or both in the discretion of the Court. And with respect to freight, the penalty was that the company should be guilty of a misdemeanor, and, upon conviction, fined not less than $100.00, and the officer or agent fined or imprisoned, or both, in the discretion of the court.

Hunter vs. Wood, 209 U. S., 473.

So that, with respect to the ordinance here questioned, the penalties denounced are as surely destructive to the company, if enforced, and within a period of two or three months, as the penalties imposed in the statutes of Minnesota and of North Carolina, and the words of the court in said cases are directly applicable to the situation of appellee herein, except that the appellee in this case has been so sure that the rates were confiscatory that it braved all the risk of destruction and confiscation by the enforcement of the penalties rather than be subjected to the slower process of confiscation by submission to the terms of the Act.

As suggested by Justice Brewer in the Cotting case, the ordinance here could have been saved, by providing that the penalties therein named should only be imposed after a reasonable length of time, or only after there has been final determination of the validity of the ordinance or statute in question.

Applying such principles to the case at bar, it is manifest that, if one challenges the validity of such an ordinance as the one here attacked and fails, the consequence is or may be the utter confiscation of the entire property sought to be conserved by the interested company. Such a result following the enforcement of an Act or ordinance, as decided in the two cases above mentioned, renders said Act or ordinance unconstitutional, regardless of the effect of the rates mentioned upon a fair return upon the value of the property devoted to the public service.

Respectfully submitted,

J. W. CALDWELL,

R. E. L. MOUNTCASTLE,

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SAMUEL G. SHIELDS,
Of Counsel.

Office Supreme Court, U. S.
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CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. ~~215~~ 17.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE,
Appellant

vs.

KNOXVILLE WATER COMPANY,
Appellee.

ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

REASONABLE RATES CASE.

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City Attorney,
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In the Supreme Court of the United States

OCTOBER TERM, 1907.

No. 217

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE,
Appellant

vs.

KNOXVILLE WATER COMPANY,
Appellee.

ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

REASONABLE RATES CASE.

I.

STATEMENT OF CASE.

This cause is brought by appeal from a decree of the Circuit Court of the United States, for the Eastern District of Tennessee, enjoining as unconstitutional and void a city ordinance, regulating the rates of a water company.

Both parties are citizens and residents of the same state, and the jurisdiction of the Court is dependent upon the Federal questions involved.

The bill was filed December 7th, 1901, by the Knoxville Water Company (hereinafter called "The Water Company") against the Mayor and Aldermen of the City

of Knoxville (hereinafter called "The City"), and seeks to enjoin the enforcement of an ordinance of the city, passed March, 30th, 1901, regulating and reducing the rates charged consumers (other than the city, itself), upon the ground that the ordinance is unconstitutional and void, for certain reasons therein stated.

The objections to the constitutionality and validity of the ordinance set up by the bill, stating them in a general way, are:

First: That the regulation of the rates of the water company, made by the city ordinance, constituted a violation of the contract between the water company and the city forbidding such regulation.

Second: That said ordinance was enacted by the city arbitrarily, without notice to the water company, and without affording it an opportunity to be heard, and without hearing or investigation.

Third: That the rates fixed and prescribed by said ordinance were unreasonably low and confiscatory.

Record 2—68.

The answer of the city filed 4th January, 1902, denied and put at issue all material averments of the bill. It likewise interposed defenses of estoppel and *res adjudicata.* Replication was filed, and the cause put at issue January 16th, 1902.

Record 73—108.

Restraining order, forbidding the city to enforce said ordinance and enjoining the city from instituting or prosecuting suits for its violation, was granted December 10th, 1901. Preliminary injunction to the same effect was granted February 1st, 1902.

Record 69, 241-246. 284.

The water company had, during the period of eight months elapsing between the date of the ordinance and the filing of its bill, defied the city ordinance and refused to put it into effect. During that period prosecutions had been instituted by the city against the water company for the penalty provided by the ordinance for its violation, and one of these suits had already, before the filing of the bill, been decided, and the ordinance sustained by the Supreme Court of this state.

Record 9-10, 247-267.

This ordinance, therefore, which was passed the 30th of March, 1901, has not for a single day ever been complied with by the water company. Although the city has been engaged in continuous efforts during that period to enforce the ordinance, it has never been able to do so. The effect of the ordinance has never, on account of the obstructions interposed to its enforcement by the water company, been subjected to actual test of its effect upon the company's business and rates.

This cause was reached for hearing in the Circuit Court, October 6th, 1902, eight months and twenty days after it had been put at issue and at the second term of the Court thereafter. The water company had not taken a syllable of evidence at that time. The city insisted upon a trial of the case. The Court, however, without hearing the case, or settling any of the issues, questions or principles involved, ordered a reference to a Special Master, which was submitted by the water company's attorneys. This order, by mistake or inadvertence, recited that it was made "by consent." The Court, by subsequent order, corrected this mistake.

Record 192—203. 280.

The manner of making this order of reference and its terms, will be the subject of comment in a subsequent part of this brief.

The Special Master made report covering a very wide field, both upon the law and the facts of the case, being of necessity "a law unto himself," for want of any specific directions by the Court.

Record 165-187.

Pending the consideration of this report and exceptions thereto the water company amended its bill, whereupon the city renewed and interposed its demurrer, which was overruled.

Record 279-281.

Both parties filed exceptions to this report, those of the city being largely to the Special Master's erroneous views of the law, and to his application of such erroneous views of the law to the conceded and undisputed facts of the case.

Record 152-164. 188-191.

All of the city's exceptions to the report, and all but one of the water company's exceptions were overruled, as shown by the final decree.

Record 289-291.

The Court, in disposing of the exceptions and other issues in the case—no hearing of the case having previously taken place—delivered an exhaustive written opinion, stating distinctly the principles of law upon which he proceeded to sustain the bill and the Special Master's report alone upon the ground that the rates prescribed by the city ordinance were confiscatory.

Record 295-308.

The city filed petition to re-hear, setting out at length the propositions of law stated in the Court's original opinion and applied in the decision of the case, which it deemed erroneous. The re-hearing was denied by the Court and the rules of law declared and applied in the

original opinion were re-affirmed and emphasized by an opinion that was likewise written.

Record 291-2.

In these opinions the Court affirmed the Special Master's views and application of the law found in his report. Inasmuch as the Special Master had, over the city's protest and objection confined his report of the income and operating expenses of the water company to one year, and that year the one immediately *preceding* the passage of the ordinance, the city presented and filed another petition, asking a recommittal of the cause to the Special Master, to report upon the income and operating expenses of the water company for at least *one year following the passage of the ordinance,* averring that the ordinance had been passed and should have been in force but for the water company's defiance of it more than eight months before the bill was filed, and for a period of nearly two years at the date of filing its petition, that proof had been taken by the Special Master on the hearing before him showing the actual income and operating expenses of the water company for a year, and more than a year after the passage of the ordinance, and that by the proof, as well as by the admissions of the water company, it appeared that the actual income of the water company for the year subsequent to the passage of the ordinance was $8,000.00, and possibly as much as $13,000.00 in excess of the income for the year preceding its passage,

and that the actual operating expenses incurred and paid by the water company, were about the same for both years. This petition sought to have the Court ascertain from the proof already taken, the actual income and operating expenses proved and admitted by the water company, as the same appeared from the books of the water company, which were collected, incurred and paid under the company's own rates during the year immediately following the passage of the ordinance, and to consider these facts occurring after the ordinance was passed and when it should have been in force in determining the question of fair return. This petition was likewise dismissed.

Record 226-230; 293-294.

The city, at the same time, made application to have a reservation inserted in the final decree, permitting it at any time thereafter it might deem advisable, to have a reference to a Special Master to ascertain whether, on account of changed conditions, increase of income, or from other cause, the ordinance could be applied to the rates of the water company, and still afford a fair return. This application was likewise denied.

The two objections urging absolute grounds of unconstitutionality against the ordinance, were overruled by the Court, and its decree placed upon, and solely upon, the ground of conditional unconstitutionality, towit: that

the ordinance fixed rates that were confiscatory, and that would not afford the water company a fair return. The effect of the Court's action, as well as that of the Special Master was to determine the case upon the basis of income and operating expenses existing during the year prior to its passage, and to ignore the actual admitted facts as to income and operating expenses that occurred under the ordinance after it was passed. The objection that the ordinance was invalid, on account of the rates therein fixed, being confiscatory, is one of conditional unconstitutionality. This ground of objection does not destroy the ordinance, but only prevents its operation so long, and only so long, as the conditions as to the value of plant, amount of income and operating expenses, shall be and remain such as to confiscate the water company's property if the ordinance is put into effect. If at any time after the passage of an otherwise valid ordinance conditions are so changed as to render its operation just and fair, the courts would not continue to enjoin that operation upon this ground.

The city assigned numerous errors to the action of the Court and prayed and obtained an appeal.

The questions raised by the assignments of error are largely, if not wholly, questions of law. These assignments of error will be set out and discussed in order, and the facts pertinent to each assignment will be stated in the proper connection.

II.

STATEMENT AND DISCUSSION OF ASSIGNMENTS OF ERROR.

(1)

No Contract Forbidding City's Regulation of Water Company's Rates to Consumers.

The Circuit Court properly overruled the contention of the water company, that the city's ordinance of March 30th, 1901, *was unconstitutional and void, for the alleged reason that it violated any valid contract between the city and the water company in regard to the latter's rates.*

This ordinance, it will be observed, does not undertake to change the contract as to rates between the water company and the city itself, but only to regulate the rates charged by the water company to other water consumers than the city. That the city possessed the power to regulate by ordinance the rates of this water company, and that there existed no contract between the city and the water company that could or did curtail or prevent the full and free constitutional exercise of this power by the city, has been fully considered and finally settled by adjudications, both of the Supreme Court of Tennessee and of the Supreme Court of the United States.

Knoxville Water Co. vs. Knoxville, 107, *Tenn.* 647. *Same case,* 189 *U. S.,* 434. .(47 *L. Ed.* 887.)

These decisions were rendered in a suit between the parties to this cause, whereby the city sought to recover of the water company the penalty provided by the ordinance of March 30th, 1901, for its violation. Every objection that is or can be made to the constitutionality and validity of said ordinance in this cause, was made in that case. By both of said courts, the power of the city to regulate the rates of the water company was unequivocally declared. By both courts the contract between the city and the water company, with reference to the latter's rates, was declared insufficient to curtail or prevent the free constitutional exercise by the city of its power to regulate the rates of this company. In both the bill and the answer in this case, the decision of the Supreme Court of Tennessee is set up by averment, and in the answer, this decision is relied upon as an estoppel or *res adjudicata.*

The decision of the Supreme Court of the United States upon the writ of error, had not been rendered when the bill and answer in this cause were filed, but that Court affirmed the judgment of the Supreme Court of Tennessee. This question, we insist, is not an open one, on this record, but if it were an open one, there is no such probability that both of said Courts erred, or that this Court will desire to overrule its former decision, to justify a re-argument of the question upon its merits in this cause. The fullest discussion of the question will be found in the opinions of the Courts above referred to. The action of the Circuit Court, therefore, in refusing to

sustain the bill and grant relief on this ground, was unquestionably correct, and should be sustained.

(2)

Ordinance Not Void for Want of Notice, Hearing, or Investigation Before or Upon Its Passage.

The city's said ordinance of March, 30th, 1901, is not unconstitutional and void for the alleged reason that it was passed arbitrarily without notice to the water company or without giving it a hearing or an opportunity to be heard or without an investigation of its business, because: (a) This contention is not supported by any proof. (b) But if the facts averred were proved, that would not, as a matter of law, invalidate the ordinance. (c) This question is precluded by the decisions hereinbefore cited.

The material averments of the bill upon which this contention is based, are as follows:

"Your orator charges that said ordinances of March 30, 1901, and October 4, 1901, were passed, enacted and ordained by defendant *arbitrarily without any effort* to show that the rates charged by your orator were unreasonable, and regardless of the *burden in any event upon defendant to show that your orator's rates were unreasonable*, without *due and legal notice* to your orator and

NOTE.—Italics in this brief are our own.

without *proper and legal investigation of your orator's condition or the effect of the rates sought to be enforced by said ordinance.*

"Your orator charges that defendant did not *know*, nor did it *seek to ascertain* what would be the effect of the meter rates prescribed in its ordinances, some of which are much *below the actual cost of furnishing the consumers with water* and which on an average are between thirty and thirty-three per cent. lower than the meter rates provided in the schedule set forth in Exhibit No. 6 hereto, which were approved and adopted by the ordinance contract of October 20, 1899.

"Your orator charges that defendant did not *know* and did not *seek to ascertain* the effect which the reduced fixtures rates prescribed in its aforesaid ordinances *would have upon the revenues of your orator*, although the number of fixtures in the city of Knoxville to which said rates would be applicable could have been easily counted and ascertained.

"Your orator further charges that prior to the passage of defendant's aforesaid ordinance of July 27th, 1900, said defendant and its proper officials were duly *notified* and *warned* that the rates then being enforced by your orator under its contracts as aforesaid, did not produce to your orator revenue sufficient to meet its necessary fixed charges and necessary operating expenses, including all salaries, which to the higher officials of your orator were merely nominal; and prior to the passage of the aforesaid ordinance of March 30th, 1901, defendant,

and its proper officials, *were informed as to the approximate gross revenue of your orator, its operating expenses and fixed charges*, and defendant and its proper officials were *notified* and *warned* that said revenues were wholly inadequate to meet and satisfy said operating expenses and fixed charges, and no dividend had ever been paid upon the stock of defendant (other than the so-called preferred stock) which was held and owned by about two hundred different people who had invested their money in your orator and had received no sort of return therefrom. • • • •

"Your orator is advised and therefore further charges that the aforesaid ordinances of the defendant, Mayor and Aldermen of the City of Knoxville, passed on March 30th, 1901, and October 4, 1901, are void because: 1st. By said ordinance defendant attempts to exercise judicial powers *without notice* to the parties affected thereby, without a *hearing of the controversy* and *without any investigation* of the matter to be determined. • • • •

"3rd. The rates as prescribed by said ordinance were fixed without any *legal notice* to your orator and without *proper hearing or investigation* as aforesaid, and if enforced will operate to deprive your orator of its property without due process of law."

Bill, Record 13, 14, 15.

This bill was signed and no doubt drafted by the attorney and *verified by the oath of the General Superinten-*

dent of the water company, who had been in charge of the water company's business for several years.

It will be observed that the water company avers that the burden of proof is upon the city to show that the company's rates are unreasonable, and that it further avers that its own rates were discriminatory and that it was furnishing water to a certain class of consumers below the actual cost of the service. The denials of the answer of the city of the above recited averments of the bill is direct and positive and accompanied by a full explanation of the whole matter of notice, hearing and investigation.

Answer, Record 80-84.

And the plea of *res adjudicata* to this as well as other aspects of the bill is set up and relied upon.

Answer, Record 88-91.

The averments of the bill in this regard, if proved to be true, are and should be very prejudicial and damaging to the city's case, and discrediting to the rates fixed by said ordinance. On the other hand, if said averments are false, or made recklessly and in bad faith, they are and should be seriously prejudicial to the case of the water company. The bill, it should be borne in mind, is one whose sole object was to obtain the extraordinary process of injunction from a court of conscience for the extraordinary purpose of staying an arm of government against the

enforcement of a law or ordinance enacted by public authority for the protection of the people. In such a case, if in any, the requirement of courts of equity that a complainant, asking relief must come into court with clean hands, should be rigidly applied. The averments of such a bill must be candid and honest or at least believed to be so by the complainant making them. If it should appear that the complainant in such a case seeks, not lawful redress, but undue advantage of his adversary, by an abuse of the extraordinary process of the Court, he ought to be repelled. These averments of the bill are not only not proved, but, on the contrary, utterly disproved by the evidence in this case. It should be borne in mind that the city ordinance of March 30, 1901, which is assailed in this case, is but a re-enactment of the ordinance of July 27th, 1900, to cure a technical defect in the latter ordinance, which had on that account been assailed by the water company in the courts. The same is true of the ordinance of October, 1901. For a period of 17 or 18 years, covering the entire existence of this water company, prior to the passage of the ordinance of the 27th of July, 1900, of which the ordinance of March 30, 1901, was a re-enactment, the water company had, with a perfectly free hand, and without interference on the part of the city, fixed and prescribed its own schedule of rates for its consumers. It may be safely stated and assumed under these circumstances that the water company had maintained rates sufficiently high and remunerative to itself. During this period there had been no change of the water company's

rates except that, in 1895, some readjustment of the rates, which was probably favorable to the company rather than to the city, was made. This was five to six years before the ordinance in controversy was passed. During this period of seventeen or eighteen years the population of the city of Knoxville had rapidly increased. Its population in 1880 was about 11,000; in 1890, 22,000 to 23,000; in 1895, 27,000; in 1897 North Knoxville and West Knoxville, adjoining corporations, with something over 4,000 population, were added to the city limits, and in 1900 and 1901 the population of the city had advanced to some 35,000 or 40,000. The city was prosperous and rapidly growing in population and business. During the period from 1894-5 to 1901-2 the income of the water company had about doubled, increasing during that period from about $50,000 to about $100,000. Its operating expenses had not increased during this period in the same ratio. These facts are shown by the statement of the Treasurer of the water company, whose estimates of income, as we shall see later, were too low, and whose estimates of operating expenses were too high, by a table found on page 738 of the record. During the period following the year 1890 there was a marked increase in the number of water consumers in the city. In December, 1890, there were 1800 consumers; in 1895, 2220; on March 31, 1900, 3,896; March 31, 1901, 4,323; March 31, 1902, 4,734.

William Wheeler, Rec.
Elbert Wheeler, Rec. 745.

During this period it appears that the cost of furnishing water to consumers had, in a general way, diminished. It would seem that the desire of the people of the city expressed in the action of their representatives to know something about the reasonableness of the rates that they had been for over 17 years and were still paying for water, was not under these circumstances at all unnatural. Nor was the suspicion wholly without foundation that water rates fixed and maintained alone at the will and pleasure of the water company had become unreasonably high and oppressive. The city had a right and the power and it was its plain duty under these circumstances to investigate and know something of the reasonableness of the water company's rates. And it was the plain duty of the company, on the other hand, to disclose such pertinent facts, as were wholly within its knowledge, to the city authorities. There was certainly nothing arbitrary, unreasonable, or illegal upon the part of the city in entering upon the investigation and if necessary the regulation of the rates of this water company after its long indulgence of the company in fixing its own rates and after such marked changes in population, and income, etc., of the company.

It is averred, however, that the city took action upon this matter without notice to the water company and without giving it a hearing or an opportunity to be heard. If these were the facts the city undoubtedly committed a wrong. These, however, are not the facts. There is no evidence whatever, to sustain this averment. It is utterly

disproved. Upon this point the water company examined seven of the eleven aldermen who composed the board that passed the ordinance in question, being the same board that passed the ordinance of July 27th, 1900. On behalf of the city, the mayor and one of the remaining aldermen, who was chairman of the water committee of city council, testified.

Record, 1029—1083.

There is absolutely no conflict in the evidence which shows that the discussion and negotiations that led up to the passage of the ordinance regulating rates first on the 27th of July, 1900, and again re-enacted to cure a technical defect on the 30th of March, 1901, covered a period of from one to two years. During that period there was accorded to the president, general manager and attorney of the water company by the city council and by the chairman of the water committee frequent and repeated hearings both formal and informal, and sometimes at great length. Reports of all the proceedings had during this period appeared in the newspapers of the city and came to the knowledge of the officers of the water company. Information on the pertinent and vital points were demanded by the city authorities of the officers of the water company and this was curtly refused. The position assumed and maintained throughout by the water company and its officials was that the city had no right or power to regulate its rates, and therefore no right to inquire into its busi-

ness, and that it was impertinent for the city to do so. The chairman of the water committee was refused an annual report of the company. The city council were told that the attorney of the water company could drive a four-horse wagon through their proposed ordinance. These facts are substantially admitted by the general superintendent of the water company, the same person *who made affidavit to the truth of the averments of the bill.*

F. C. Kimball, 888-893.

And they are not denied by any of the officials of the water company.

While the ordinance of the 27th of July, 1900, of which that of March 30, 1901, is a mere re-enactment, was pending for passage before the city council, and after it had been referred to the water committee, and after the extensive discussions and hearings already referred to had been accorded the water company by the city council and water committee, the Mayor of the city on the 16th of July, 1900, addressed to the water committee of the city council the following letter:

"Knoxville, Tenn., July 16, 1900.

"Messrs. A. S. Birdsong, J. J. Conner and G. B. Davis,
Water Committee.

Gentlemen: The ordinance regulating rates to be charged by the Knoxville Water Company has passed two readings and been referred to your committee for investigation and report prior to its third reading.

In view of the great importance of the subject and of the fact that the City of Chattanooga has had some experience connected with the regulation of water rates, I thought it advisable to make the following suggestions:

The law holds that the rates fixed by municipal corporations for *quasi* public corporations, such as water companies, gas companies, electric light companies, etc., must be reasonable, but unfortunately, in this state no decision has fixed a standard of just what is a reasonable rate and what is not a reasonable rate. It is unquestionably true that there is a great complaint among the citizens that the water company's rates are too high.

I suggest in order to have some way to arrive at a decision as to what is a reasonable rate, that your committee ascertain from the water company:

First. As to its bonded debt and interest thereon.

Second: Its gross income.

Third. Its operating expenses including all salaries.

Fourth The valuation it fixes upon its plant.

Fifth. The original cost to the present owners, Messrs. Wheeler & Parks.

Sixth. The kinds of improvements and the cost of the same since Messrs. Wheeler & Parks have been the owners.

The Mayor and Aldermen of Chattanooga in 1897 passed an ordinance regulating the rates of the City Water Company for the city. The City Water Company filed an injunction bill in the United States Federal Court, Judge C. D. Clark presiding, and procured an injunction against the Mayor and Aldermen from carrying the rates fixed by the ordinance into effect. That suit is now pending in the Federal Court at Chattanooga, and Judge Clark has referred the question of what is a reasonable rate to a special master, Joshua W. Caldwell, of this city, to take

proof and make report. Mr. Caldwell has not yet made his report because the proof on the part of the city is not all in. The proof on the part of the water company has been taken. In its bill, the City Water Company alleged as one of its charges that the rates fixed by the Mayor and Board of Aldermen were fixed without due investigation on their part, and that they did not know anything about the cost or the financial condition of the Water Company when they fixed the rate. The Water Company further claimed that it would be necessary for the Mayor and Aldermen to know its financial liabilities before it could fix rates that would be reasonable and that the Company had no opportunity to be heard before the Committee to which the ordinance had been referred for investigation.

Now it is in order that no such charge shall be made against the City Council of Knoxville that *I suggest to your Committee to get at the different items of the financial condition of the water company as above set out.*

I further suggest that your committee grant a full hearing to any representative of the water company who may desire to appear and to all citizens of Knoxville who want to be heard upon this subject.

In the testimony taken by the City Water Company in the Chattanooga case a full statement of its financial condition was set out, and in the event that litigation should ensue from the passage of the Knoxville ordinance on its third reading, *it would be necessary for the water company to show up the financial condition; so that I take it that the water company would not hesitate to give the information that your committee might request.*

It is unnecessary to say that the regulation of water rates in Knoxville is a matter of the greatest and most universal importance, and that your committee should

procure all the information in your power upon the subject by the fullest and most painstaking investigation and it is in view of the importance of the subject that I have thought it proper to call your attention to the matters herein, and especially that the ordinance will stand the test in the courts.

Respectfully,
S. G. HEISKELL, Mayor."

This letter of the mayor was, on the 16th of July, 1900, forwarded by Alderman Birdsong, Chairman of the Water Committee, with the following letter written by Mr. Birdsong, to the water company:

"Knoxville, Tenn., July 16, 1900.

Knoxville Water Company,
Frank C. Kimball, Supt.,
Knoxville, Tenn.

Dear Sir:—An ordinance regulating your rates for the furnishing of water to the citizens of Knoxville has passed *two readings* in the City Council, and has been *referred to the Water Committee for investigation and report prior to its passage upon its final reading.*

In order that the City Council may have full information upon which to act in its effort to fix a rate that is reasonable for water, I respectfully request that you send me the following statement:

First. The amount of the Water Company's bonded debt and the interest thereon.

Second. Its gross income.

Third. Its operating expenses, including all salaries.

Fourth. The valuation it fixes upon its plant.

Fifth. The original cost to the present owners, Messrs. Wheeler & Parks.

Sixth. The kind of improvements and the cost of the same since Messrs. Wheeler & Parke have been the owners.

This request for information is not based upon any improper motive or desire to pry into or meddle with the financial affairs of your Company, but in order that the City Council may have as full information as possible in passing upon the question as to what is a reasonable rate to be fixed for the furnishing of water by your Company in this City.

An immediate reply will be greatly appreciated.

A. S. BIRDSONG,
Chairman Water Committee."

Answers to these questions would have furnished all the data essential to fixing just and reasonable rates. The questions would serve admirably for framing an order of reference. If the water company could not or would not answer these questions, then the city could not obtain the information desired.

On July 17th, the water company, through its general superintendent, Mr. Kimball, replied that he was not in possession of the information desired, and that he had forwarded to the treasurer of the company, Mr. Birdsong's communications. The water company, through its treasurer, Mr. Elbert W[illegible]eler, replied to these letters of the Mayor and of the C[illegible]man of the Water Committee under date of July 20, as follows:

"Boston, Mass., July 20, 1900.

Mr. A. S. Birdsong,
Chairman of Water Committee
Knoxville, Tennessee.

Dear Sir:—

Yours of the 17th inst. to our Superintendent at Knoxville is referred to us for reply, as stated in his acknowledgement thereof to you of the same date.

Presuming that your letter was prompted by the communication of the 16th inst. from his honor, the Mayor, recommending for reasons enumerated by him, the specific inquiries contained in your letter to us, you will permit us to say, that even should we concede the right of the city to change the rates charged by us for water *(which we do not, but, on the contrary maintain that these are fixed by existing contract stipulations, between the City and us, and are, therefore, not subject to change, except by mutual agreement)*, the Committee would have no *adequate basis for reaching equitable conclusions* by having the information asked for in interrogatory number 1 (which information is, of course, available to the City from the County records), as the amount of the Company's bonded debt represents only one of several classes of capital invested in the works, all of which are fairly entitled to reasonable *investment return* before any reduction of rates or of income can properly become operative.

We suppose, however, that the City desires to avoid taking any action which would result in preventing such reasonable income return upon the monies invested from time to time, which investments have been necessitated by the continued growth of the City, the demand for filtered water and numerous other additions to and improvements of the Company's plant, resulting in a system necessarily of large cost, but giving the City a supply propor-

tionate to its requirements, with water of a quality hardly to be equaled in any city of the South or West.

As to the single purpose of his Honor, the Mayor, in addressing your Committee, *was unreservedly stated to contemplate determination of the financial condition of the Water Company in order that the City may be informed whether or not the present rates are reasonable in view of the cost or of said financial condition, and as your letter likewise unreservedly declares this to be the purpose of* your inquiry we may and do *answer interrogatories* 2 and 3 *by saying that the gross income of the Company is not sufficient, after paying necessary operating expenses, including salaries,* (which are merely nominal in amount to its executive officers) *to afford or pay a reasonable return upon all of its several forms of capitalization;* but on the contrary not a little of the money invested by its shareholders has been absolutely without return. Any reduction therefore of its net income through reduction of rates would necessarily and correspondingly postpone the time when such reasonable return could be obtained.

Any reply to question 4 could be *only an expression of personal opinion, to which anyone might and doubtless with great propriety, well take exception.*

The 5th question, it is impossible for me to answer, having no knowledge thereof. We may, however, say that Wheeler & Parks never owned works, title to them always resting in numerous stockholders, the present number approximating 200.

The 6th inquiry is practically answered by the preceding statements, except as to the cost of improvements which we *respectfully submit is immaterial, in view of the declaration, made in answering interrogatories* 2 *and* 3; said cost being included in capitalization from which no

adequate or reasonable return has thus far been possible of realization.

We have no desire to withhold from the City *any information which is its due;* but the statement above made, should *clearly indicate that any lower rates than those now existing, may not be deemed reasonable,* when account is taken of the *cost of construction* and operation of the plant, as above set forth.

If *further information* is wanted or if it is desired to equitably adjust this or any other matter of mutual interest we beg to assure you we will gladly take it up with you, being confident that when a full understanding of essential details is reached, there cannot only be no reasonable grounds for complaint, but an adjustment reached to our mutual satisfaction.

Very respectfully,

(Signed) KNOXVILLE WATER COMPANY,
Elbert Wheeler, Treas."

This correspondence appeared at the time in the newspapers. On the 20th or 21st of July, 1900, the general superintendent and the attorney of the water company appeared before a meeting of the city council at which the mayor and seven aldermen were present, and as the general superintendent admits in this case the water company's attorney discussed the ordinance at great length. Notice of this meeting appeared in a newspaper of the city which came to the attention of the officials of the water company who were present at the meeting.

Record 890, 1069-70.

The public notice of this meeting that appeared in the newspaper, was as follows:

"TO HEAR CATES.

CITY COUNCIL WILL MEET THIS AFTERNOON.

WATER COMPANY'S SIDE WILL BE PRESENTED.

Against Alderman Birdsong's Rate Ordinance—Will Not Pass Third Reading To-night.

A special meeting of the City Council will be held in the Council Chamber at 4 o'clock this afternoon. The meeting will be held for the purpose of hearing Chas. T. Cates, Jr., Attorney for the Knoxville Water Company, speaking in behalf of the Company concerning Alderman Birdsong's Water Rate Ordinance. Mr. Cates has intimated a number of times that he would be pleased to appear before the Council, or the Water Committee, and explain the Water Company's situation in the matter. The opportunity will now be given him. Alderman Birdsong returned to the City this morning and formally invited Mr. Cates to appear before the Council this afternoon. Mr. Cates accepted the invitation. The Water Rate Ordinance, contrary to expectations, will not be brought up for final reading and passage at the regular meeting to-night. At least that was the program announced to-day at noon. *The final reading has been postponed in order that additional information desired may be obtained. Alderman Birdsong is awaiting the reply of the 'Home Office' of the Water Company in regard to information asked as to the general financial condition of the company. Upon*

receipt of this information, a called meeting may be held at which the ordinance may be brought up for final reading and passage. The ordinance, after passage, will doubtless be contested by the Water Company, and it is expected the courts will be resorted to.

Alderman Birdsong claims that the city has a right to, and will regulate the rates. 'The only question to be laid before the courts,' he says, 'is whether or not the rates as regulated are reasonable. That is the only question for decision, and as the rates are undoubtedly reasonable, the ordinance will be made effective. *We do not wish to impose upon the Water Company, but merely want cheaper and more reasonable rates, and intend having them.* After this ordinance we will probably take up the other phases of the water question, which have claimed the attention of the Board of late. These questions at issue are the change of location of the intake tower, the increase of pressure and size of mains in East Knoxville. On recent inspection I also found that the water supplied West and North Knoxville is so muddy as to be unfit for use. I will bring these different matters before the Council, one at a time, and intend the City shall have a better water service, if it is in my power to get it.'

In regard to the hearing to be given Mr. Cates, Alderman Birdsong said: 'In accordance with the desire of Mr. Cates, we have invited him to appear before the Council in behalf of his Company, *and we will listen readily to any statement he wishes to make. I think this is nothing but just and fair. The Council does not wish to impose upon the Water Company or any other corporation and will not do so.'* The Council will hold its regular meeting tonight but what is likely to come up before it, is not yet known."

As stated, the attorney of the water company who signed and *the superintendent who made affidavit to the truth of the bill were present and the former made extensive argument on the occasion referred to in this newspaper notice which the superintendent admits he had seen.* All of this correspondence which we have above quoted was known to the officials of the company when the bill was filed. The ordinance was not passed finally until the 27th of July, 1900. It will be thus seen that the water company not only had opportunity to be heard but had abundant hearings and that it refused to answer and give information as to specific and pertinent questions that would have enabled the city council to proceed more intelligently. It would give no information as to its gross income or its operating expenses or the value of its plant. In fact it fails to aver in its original bill in this case the *actual value* of its plant, contenting itself with the averment that the construction of the plant had *cost* the water company more than a million of dollars.

Record 11.

Mr. Birdsong was asked by the water company's attorney on cross-examniation, apparently in a facetious vein: "Q. What was the reason that you did not *persist* in your effort to get information from the Knoxville Water Company?

A. Why, they refused to give it to us as that letter states there. That letter there answers the whole thing."

Record 1077.

The finding of the Special Master upon this point is as follows:

"I find and report that the extent and kind of investigation made by the defendant consisted of a formal communication from A. S. Birdsong, Chairman of the Water Committee, of date July 16th, 1900, Exhibit 4 to answer. *the investigation of other plants and their rates stated in the deposition of Birdsong and perhaps other parts of the testimony not necessary to point out here.* To this letter complainant made reply July 20, 1900 (Exhibit 6 to Answer). This *reply would convey to my mind the impression that the complainant did not intend to expose its business to the Committee and would justify the City in proceeding independently of complainant without further negotiations,* and the proof shows that witness Birdsong and others *made diligent efforts to inform themselves.*"

Record 187.

And the Circuit judge, confirming this aspect of the report, says:

"Now the plaintiff water company, *it is quite evident, denied the right and power of the city to regulate its charges,* and in upholding that right *it refused, on request, to furnish* the Mayor and Aldermen of the City of Knoxville *any evidence or data on which that legislative body might have proceeded more intelligently to determine what rate or charge would be fair and reasonable, as permitting a just return on the real value of the property.* Such an inquiry involved the two questions here

involved, namely, of fair and reasonable value and fair and just return on that value.

"It seems that the Mayor and Aldermen were, *to a large extent, therefore, under the necessity of making a strike in the dark, if they did anything.*"

Record 307.

Again, it is averred in the bill that the city council proceeded without investigation or information essential to determine the reasonableness of the rates fixed in the ordinance. The special master has found that the city officials "made diligent efforts to inform themselves." The Circuit Judge finds that the water company refused on request to furnish the city any evidence or data on which that body might have proceeded more intelligently to determine what rate of charge would be fair and reasonable and thereby left the city "under the necessity of making a strike in the dark if they did anything." The proof shows that the chairman of the water committee with the assistance of other members of that committee had been industriously engaged for many months in gathering facts from other sources than the water company upon which to determine the reasonableness of the rates to be prescribed by ordinance. The city officials whose plain duty it was to inquire into and regulate the rates of the water company, being thus confronted on account of the water company's default in failing to furnish data and evidence which it alone could furnish, of making a strike in the dark or doing nothing, did never-

theless before fixing the rates, resort to every possible source of information before acting. They had before them, not indeed the satisfactory evidence which they attempted to elicit from the water company, but a body of convincing facts which justified or at least seemed to justify their action. In the first place the full terms and rates of the proposed ordinance were laid before and were known to the water company. That company deliberately determined to submit to those rates rather than furnish evidence which it was their duty to furnish, to convince the city council that the rates were unjust. This fact afforded at least some presumption that the proposed rates were better and more favorable to the water company than any rates that could or would be fixed by the city upon a full disclosure of the pertinent facts in reference to its business. Among the numerous evidential facts before the city council that entered into their consideration in fixing said rates were the following:

The Water Company had paid to the State of Tennessee and the City of Knoxville for a series of years taxes (embracing its entire properties) upon the following valuations:

1896	$150,000.00
1897	$160,000.00
1898	$165,000.00
1899	$165,000.00
1900	$200,000.00
1901	$275,000.00

Record 101.

Assessments for taxes in Tennessee are required both by statute and by the constitution to be at actual cash value. The proof shows, however, that in fact and in practice, property is assessed at about 70 per cent. of its value.

Record 1056-1058, 1067.

Assessments are made as of the 10th of January of each year. The water company's property, upon this basis, would have been worth at its actual cash value, in 1901, $347,500.00. It would seem that the company ought to be content if it is permitted to pay taxes to the state and the city upon the basis of $275,000.00 and is allowed to exact from the people of the city a fair return upon the same property at a valuation of $347,500.00. Taxes are the price paid by the taxpayer for the benefits of government and the protection of the laws and are or should be proportioned to the value of property protected. In addition the chairman of the water committee corresponded extensively and obtained the water rates of other cities for comparison with the water company's rates charged to the people of Knoxville. The effort was to obtain the rates of cities similarly situated with the city of Knoxville and such as were not similarly situated were excluded from consideration. The result of this comparison of rates which were published in the newspapers and known to the officials of the water company before the passage of the ordinance, and not controverted by any one, was as follows:

Knoxville, net family per year, $6.00; net family per 1,000 gallons 25 cents; factory rate per 1,000 gallons, 7 cents.

Allentown, Pennsylvania. Net family per year, $3.50.

Aurora, Illinois. Net family per year, $4.00. Net family per 1,000 gallons 8 cents; factory rate per 1,000 gallons 5 cents.

Augusta, Georgia. Net family per year $5.00; net family per 1,000 gallons 10 cents; factory rate per 1,000 gallons, 10 cents.

Akron, Ohio. Net family per year, $5.00.

Canton, Ohio. Net family per year $4.50; net family per 1,000 gallons 15 cents; factory rate per 1,000 gallons 3 1-2 cents.

Elgin, Illinois. Net family per year $4.00; net family per 1,000 gallons, 14 cents; factory per year $4.50.

Des Moines, Iowa. Net family per year, $4.00. Net family per 1,000 gallons 30 cents; factory rate per 1,000 gallons 15 cents.

Evansville, Indiana. Net family per year $4.50.

Jackson, Tennessee. Net family per year $6.00. Net family per 1,000 gallons 10 cents; factory rate per 1,000 gallons 5 cents.

Louisville. Net family per year $2.40; net family per 1,000 gallons 14 cents; factory rate per 1,000 gallons 6 cents.

Lima, Ohio. Net family per year $5.00; net family per 1,000 gallons 20 cents; factory rate per 1,000 gallons 8 cents.

Saginaw, Michigan. Net family per year $4.00; net family per 1,000 gallons 11 cents; factory rate per 1,000 gallons 6 cents.

St. Joseph, Missouri. Net family per year $5.00.

Ft. Wayne, Indiana. Net family per year $3.60; net family per 1,000 gallons 10 cents; factory rate per 1,000 gallons 6 1-2 cents.

Newport, Kentucky. Net family per year $5.00; net family per 1,000 gallons, 10 cents; factory rate per 1,000 gallons 7 cents.

Roanoke, Virginia. Net family per year ————; net family per 1,000 gallons 25 cents; factory rate per 1,000 gallons 15 cents.

Davenport, Iowa. Net family per year $6.00; net family per 1,000 gallons 20 cents; factory rate per 1,000 gallons 15 cents.

Atlanta, Georgia. Net family per year $7.20; net family per 1,000 gallons 10 cents; factory rate per 1,000 gallons 8 cents.

Mobile, Alabama. Net family per year $10.00; net family per 1,000 gallons 50 cents (which has since been greatly reduced).

Quincy, Illinois. Net family per year ————; net family per 1,000 gallons 20 cents.

Indianapolis, Indiana. Net family per year $2.20; net family per 1,000 gallons 5 cents; factory rate per 1,000 gallons 5 cents.

Chattanooga, Tennessee. Net family per year $6.00; net family per 1,000 gallons 20 cents.

Record 82-3; 1064-1067.

The facts thus gathered clearly indicated the excessiveness of the water company's rates. In addition, the city of Knoxville is favorably situated for the cheap operation of a water plant. It is situated on a river of sufficient capacity to afford an abundant water supply. It is compactly built. There are within the city and near it suitable and convenient elevations for stand-pipes, etc. It is in the immediate vicinity of an abundant fuel supply. There were other facts developed by the investigations made. If the water company has suffered injustice in the fixing of rates by the city ordinance it is an injustice that it deliberately and voluntarily assumed to bear. It knew what rates were proposed and upon what evidence and grounds they were supported. It was requested to furnish the city council, to enable it to act with perfect justice and intelligence, its estimate of the value of its plant and the amount of its income and operating expenses. That information could have been ascertained with accuracy from no other source, and the water company arbitrarily refused to give it. What single fact of the slightest value did the letter of its Treasurer disclose in answer to the pertinent interrogations of the Chairman of the Water Committee? The Treasurer assumes the attitude of judge, both of law and facts, and of a judge who merely states his conclusions without justifying them. Its appeal to a court of conscience under these circumstances to enjoin as arbitrary and illegal the exercise of discretion by the city council in fixing rates and thereby to disarm the city government of the power

to protect the citizens from oppressive rates, has no equity to support it. If it has suffered injustice, that injustice is self-inflicted. If it has compelled the city to strike in the dark when it was the right and duty of the city to strike and of the water company to afford light in order that it might strike safely, it must take the results of the blow even though the blow be misdirected. The result, however, reached by the city authorities, was not unjust to the water company. They fixed the value of the water company's plant at $500,000.00—a sum which as we shall see hereafter was more than adequate. The Special Master, including several matters that we insist cannot enter into the fair value of this company's plant, fixed the value at only a little more than $100.000.00 in excess of said amount; and he admits that in several respects his valuations are high. His estimate was moreover of the value of an entirely new plant. They estimated the income of the plant at from $75,000.00 to $80.-000.00, whereas the water company's treasurer admits an income from water rates alone of $88,000.00 for the year preceding the passage of the ordinance.

Record 1079.

This income was increased from $8,000 to $13,000 for the next year.

In point of fact the income was considerably in excess of $88,000.00. They figured, after careful investigation, the operating expenses at from $15,000 to $20,000.

Record 1079.

While this is considerably less than that claimed by the company, the amount claimed by the company is very much reduced by the special master by the exclusion of improper items, and is subject to further reduction. And if there be added to the amount estimated as operating expenses, the sum by which the city officials under-estimated income, the allowance for operating expenses would be thereby increased to nearly the amount allowed by the Special Master. It thus appears that the action of the city officials was not only painstaking and conservative but entirely just, though performed under great difficulties, to the water company that unjustly, almost contemptously, refused to afford the city officials any aid in getting to a correct conclusion. They did the best that could be done under the circumstances without the aid from the water company that they were entitled to receive and requested, and this court should not enjoin their discretionary action, done in good faith and with perfect diligence, at the instance of the party who has been in fault in every particular and if it has suffered injustice has suffered it at its own hands. But if the averments of the bill upon this point had been sustained by the proof, still the ordinance would not have been on that account unconstitutional and void. The law under which the rates were fixed does not require notice or investigation, nor does it declare the action of the city council final. Unless the action of the city council had been made final and conclusive upon the water company, or the law had required notice and investigation and hearing, the ordinance fixing

the rates remains open for inquiry of the character that is made in this case, and if the court finds that the rates are reasonable, or that there is any doubt of it, the same will be sustained.

San Diego, etc., Co. vs. Jasper, 189 *U. S.,* 439; 47 *Lawyers Ed.* 892.
Same case, 38 *L. R. A.* 460.
San Diego L. & P. Co. vs. National City, 174 *U. S.,* 739; 43 *Lawyers Ed.* 1155.

The Supreme Court of Tennessee has held that the rates fixed by this ordinance are not made final and conclusive but remain open to judicial investigation.

Knoxville vs. Knoxville Water Co. 107 *Tenn.* 688-9.

We submit, moreover, that the plea of *res adjudicata* and estoppel is conclusive of this question for reasons that have been stated heretofore in this brief. On all of the grounds stated, the action of the Circuit Judge in dismissing this aspect of the case should be sustained.

For its arbitrary conduct in this regard and the unfounded statements of its bill, by which the extraordinary process of the Court has been grossly abused, the Water Company ought to be repelled.

(3)

The Rates Prescribed by the City's Ordinance of March 30th, 1901, are not Confiscatory.

A

Statement.

The material averments of the original bill upon this aspect of the case are as follows:

"The construction of this plant has cost your Orator more than $1,000,000.00, and on March 31st, 1901, (the day succeeding the passage of defendant's aforesaid ordinance of March 30, 1901) which was the end of your Orator's fiscal year, it had outstanding $150,000.00, first mortgage bonds bearing six per cent. interest and payable in 1913; $85,000.00 of 'Debenture Bonds' so-called, bearing six per cent. interest, and likewise payable in 1913; $295,000.00 of 'Preferred Stock,' so-called, bearing six per cent. interest, or calling for a cumulative dividend of that rate; about $300,000.00 of floating indebtedness bearing six per cent. interest, making an aggregate of $830,000.00, upon which your Orator was compelled to pay interest during the year ending March 31st, 1901, amounting to $48,127.78.

"The outstanding stock of your Orator, exclusive of the aforesaid 'Preferred Stock' on March 31, 1901, amounted to $654,000.00, which represents large amounts paid into your Orator by the holders of the shares of stock which *have cost many of the holders of the principal part of the stock from* $40 *to* $50 *per share.* * * * *

"Your Orator shows and charges that its necessary operating expenses during the year ending March 31,

1901, amounted to $35,775.89, exclusive of the sums allowable on account of ordinary depreciation of plant amounting to about $20,000.00, *and special depreciation or replacement amounting to about* $30,000.00 during the current year the necessary operating expenses will be heavily increased, resultant upon an increase of about $100,000.00, in the assessment for taxation of the property of your Orator, and other causes: the amount required on account of ordinary depreciation will be about the same, and another large outlay on account of special depreciation in or replacement of machinery, etc., will be necessary.

"Your Orator further shows and charges that in the operation of its business it has only sought to enforce the rates prescribed by its contracts with defendant, and particularly the rates prescribed in the aforesaid ordinance contract of October 20, 1899, yet with the most careful management and closest attention your Orator's total revenues for water from all sources, both in and out of the City of Knoxville, during the aforesaid fiscal year, ending March 31, 1901, amounted to only $88,649.41, of which $10,540 22 was collected on services wholly outside of the territorial limits of defendant, leaving a balance of $78,109.19 for services within the City of Knoxville.

"Your Orator charges that the schedule of rates prescribed in defendant's ordinances of March 30, 1901, if applied to the same services producing, under your Orator's and defendant's contract rates, the sum of $88,649.41 as aforesaid, would have produced a revenue of only $68,481.67, or a sum wholly inadequate to meet your Ora-

tor's necessary operating expenses and fixed charges of interest. * * * * * * * * *

"Your Orator charges that the enforcement of the rates prescribed in the said ordinance of March 30, 1901, would have reduced the revenues of Orator for the fiscal year ending March 31, 1901, about $20,167.74, and that for the current year the reduction will be increased by reason of the larger number of services that are becoming metered."

Bill, Record 11, 12, 14.

It will be observed that the bill avers not the *value* but the *cost* of the plant, and that it avers that the reduction of revenue by the city ordinance will operate not to deny the complainant a *fair return,* but a *sum adequate to meet "necessary operating expenses and fixed charges of interest."*

It is proper to state in this connection that the bill was amended after the Master's report had been made and had been excepted to, on the hearing of those exceptions, "so as to charge that the fair value of the property of complainant within the City of Knoxville as of date, March 30th, 1901, exceeds $1,000,000.00 and has constantly increased in value at all times since said date, which said property of said value was at said date and at all times since used in the public service for the purpose of supplying said city with water, and that the effect of the ordinance of March 30, 1901, of defendant, reducing the water rates of complainant if enforced is to deprive plaintiff of a fair and reasonable return upon its said

value of said property so used, and for that reason said ordinance is unconstitutional and void."

Record 279-80.

This amendment was not verified by affidavit.

The material averments and denials of the answer will be found upon pages 84 to 88 and 91 of the record.

All of the material averments of the bill are denied and put at issue. After denying that the ordinance rates are unreasonable and insisting that the water company is estopped to deny their reasonableness, and after denying that said ordinance rates would have the effect of reducing the pre-existing rates from 30 to 33 per cent., and after denying that it was necessary that the ordinance rates in order to be reasonable should afford an income sufficient to meet operating expenses and two per cent. for depreciation and six per cent. upon the amount that complainant had invested in the plant, it proceeds as follows:

"It is worthy of remark in this connection that the plaintiff, not only refuses to express an opinion as to its property and its *value* in the correspondence with the Chairman of the Water Committee, already quoted, but has utterly failed to suggest the value of the same in its bill in this case.

"This is the controlling fact in ascertaining the reasonableness of rates, and is entirely omitted from the bill. The Court and Council are left to guess at this value, or to compute it upon the incidental statements of the bill. It is stated in the bill that the plaintiff's plant cost more than $1,000,000.00. Defendant denies this statement with emphasis. This is not equivalent to stating that the prop-

erty is *worth* $1,000,000.00. From other allegations of the bill it seems to be conceded that there has been much loss and depreciation of the property in value, and that much of the investment has been lost in that way. It does appear from the exhibits to this answer that the property produced by this alleged investment of $1,000,000.00 has paid taxes on a valuation ranging from $150,000.00 in 1896 to $275,000.00 in 1901. One of two things must be true, that the company is getting the protection of the laws of the State of Tennessee and of this defendant, without paying for the same, or its property is worth much less than the amount that it has invested in it—in fact, only 25 per cent. of the amount.

"Taking the tax assessment as a basis of value of plaintiff's property, and inasmuch as plaintiff complains of this assessment as being oppresive it would seem to be a just basis, we have this result on the figures found in plaintiff's bill in this case:

For year ending March 31, 1901, ...		
..... Receipts		$88,649.41
Operating expenses	$35,775.89	
2 per cent. Sinking Fund, and 6 per cent. interest on the value thus fixed, the rule adopted in the Chattanooga case, 2 per cent...	4,000.00	
6 per cent.	12,000.00	
Making a total for operating expenses interest and sinking fund of.....		51,775.89
Leaving a net balance of		$36,873.52

"If the property be placed at double the assessment for that year, still there would be a net balance of $20,873.52. And placed at tripple the assessment of that year there would still remain a balance of the company's earnings amounting to $4,873.52.

"It needs no argument to show that rates which produce this result are not just and reasonable to the consumers and tax payers.

"Defendant, however, denies the statements of the bill that the necessary operating expenses of the plaintiff company amount to $35,775.89;—said sum in defendant's opinion is largely in excess of the actual sum required. Defendant denies that statement of the bill that plaintiff only derived $88,649.41 annually as revenue from the operation of its plant. It avers that a sum largely in excess of said amount is realized.

"Defendant denies the statement of the bill that $20,000.00 per annum is required to restore the ordinary depreciation of the plant, and denies the further statement that $30,000.00 per annum is required to restore special depreciation or replacement. Defendant does not understand what is meant by special depreciation or replacement, but assumes that it means some sort of permanent improvement of the plant, and does not in any case come out of the earnings, but goes to the account of investment.

"Defendant not only denies the statement that $1,000,000 has been invested in said plant, but it denies that the sum realized from the sale of bonds, stock subscrip-

tions, and from the creation of a floating indebtedness, as alleged in the bill, was invested in the plaintiff's plant, and avers that a large amount of it was diverted directly or indirectly to the benefit of Wheeler & Parks, and perhaps other majority stockholders in the plaintiff company.

"It appears, as before stated, that the plaintiff company was capitalized at $1,250,000.00. This stock should have been subscribed and paid in, and was ample in amount to meet every obligation of the company, without creating any mortgage or debenture bonds, or for the sale of any preferred stock, or the creation of any floating indebtedness. It has been only in consequence of gross, and as defendant believes, fraudulent mismanagement, that it has been necessary to create any indebtedness of said company." * * * "In fact defendant doubts whether the majority stockholders of the plaintiff company have ever paid any considerable sum into its capital, and that what constitutes the assets of the company today, consists of the valuable franchises donated to it by the City of Knoxville, and such funds as have been paid in by minority stockholders or borrowed upon mortgages of the company's property.

"Defendant denies that the sale of bonds, either debenture or mortgage bonds, or the sale of preferred stock, was necessary at any time. Defendant further denies that losses incurred in such sales are chargeable to the investment account in considering the question of reasonableness of the rates charged, or prescribed by the defendant.

"These losses have been very considerable, as will appear from the following statements: It is only claimed that about $1,000,000.00 was paid into the investment. The bill and tax schedules show that the following assets were received by the company. $940,000.00 on stock; $150,000.00 on mortgage bonds; $85,000.00 on debenture bonds; $300,000.00 on floating indebtedness, making in all $1,475,000.00, leaving unaccounted for, $475,000.00. In addition to this there was $310,000.00 of the capital stock that seems never to have been paid in.

"Defendant denies that Wheeler & Parks, the majority stockholders, have paid for their stock in said corporation, and it bases this denial largely upon the following evasive statement of the bill, to-wit: 'The outstanding stock of your Orator, exclusive of the aforesaid preferred stock, on March 31, 1901, amounted to $654,000.00, which represents large amounts paid into your Orator by the holders of the shares of stock, which have cost *many* of the holders of the *principal* part of the stock from $40.00 *to* $50.00 *per share.*"

Answer, Record 84-87.

It is further said: "The plaintiff has failed, and it seems purposely failed, to aver the one fact, which is most essential in a bill of this character, to-wit: *reasonable value* of the property which it is employing for the public use. Its averment of the *cost* of the property is not equivalent to the averment of its value. Without this averment the Court is not sufficiently informed to act upon the question attempted to be presented.

"It is especially remarkable that this averment should have been omitted from the bill, and that the plaintiff should have failed to offer proof upon this question of reasonableness of rates, after pleading it in the suit at law, and that the plaintiff company's officers should have refused to express even an opinion as to the *value* of the property devoted to the public use, at the request of the City Council and its Committee."

Answer, Record 91.

After the operation of the city's ordinance had been either defied or enjoined by the defendant for eighteen months, and after this cause had been at issue for more than eight months, and at the second term after the cause had been put at issue, it was reached for hearing and the city announced itself ready for trial. The averments of the bill on this aspect of the case had been denied by the answer and the water company had taken no proof.

Record 108, 287.

Upon this state of the record the bill should have been dismissed.

Remine vs. Vance, 11. *Heiskell*, 229.

This error, however, may be, and perhaps under the circumstances of this case ought to be overlooked, in view of the large amount of labor and expense that

has been incurred in the preparation of this case and of the importance of having the question speedily settled as to whether the city's ordinance, the operation of which has been so long suspended, is valid and enforcible. The practice and procedure adopted and pursued by the Court, no doubt with the laudable purpose of saving labor and expense, in the subsequent preparation and disposition of the case, is not only without precedent but contrary to the well-settled rules of practice and procedure in courts of equity. The Court proceeded on motion of the water company, upon the state of the record above indicated, to order a reference to a special master without hearing the case or settling any of the questions or principles involved and controverted between the parties, and without giving any direction as regards the law of the case for the statement of the account. This action of the Court was likewise erroneous, and so far from saving labor and expense has added to both, and likewise been productive of much confusion. *"It is not within the general province of a Master to pass upon all the issues in an equity case, nor is it competent for the Court to refer the entire decision of a case to him without the consent of the parties. It cannot of its own motion or upon the request of one party abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers."*

Kimberly vs. Arms, 129 *U. S.*, 512; 32 *L. ed.* 764, 768.
Patton vs. Cone, 1 *Lea*, 19.
Carey vs. Williams, 1 *Lea*, 54.

Jones vs. Douglass, 1 *Tenn. Chy.*, 357.
Remsen vs. Remsen, 2 *Johnson's Chy. Rep.*, 501; 2 *Daniel Chy. Prac.*, 1004, *Note* 7; 1221 *Note* 2, (*4th ed.*)

Of this practice Judge W. F. Cooper, an eminent equity lawyer, the author of a series of Chancery Reports, a judge for many years of the Supreme Court of Tennessee and annotator of an edition of Daniel's Chancery Practice, says, in *Carey vs. Williams, supra*:

"It is proper to state here that this case furnishes a striking illustration of the evil of the practice of referring a case to a Master without any adjudication of or ascertainment of the rights of the parties to guide him as to what is properly to be inquired into. Much trouble and expense could have been saved by first submitting the issues between the parties to the Chancellor, having his judgment upon them, and definite directions given the Master for his guidance in the investigation he was required to make. No such practice ought to be tolerated by the Chancellor as it can serve no good purpose, and in most cases leads to complication and expense."

And in *Patton vs. Cone, supra*, the same eminent judge says: "A general reference which settles nothing where there are questions of law involved must be necessarily confusing to the clerk who confines himself to his own province, the finding of facts. It is impossible for

him to act intelligently unless he assumes in connection with his own functions, the functions of the judge. He has no guidance as to what he shall omit or insert or as to how he should arrange his material. By far the easiest and best mode of conducting such a case is to have a hearing upon the merits before the reference."

It is true that by *express consent of parties* the entire case, including questions of law as well as of fact, may be referred to a Master. It is held by this Court that such reference may be made.

Kimberly vs. Arms, 129 *U. S.,* 512, 530; 32 *L. ed.* 764.
Davis vs. Schwartz, 155 *U. S.,* 631; 39 *L. ed.,* 289.

In the cases cited there was express consent of both parties for the reference of *questions of law* as well as questions of fact. There was no such consent in this case. By inadvertence of the draftsman the words "by consent" were inserted in the original order of reference, but this mistake was corrected by a subsequent order of the Court.

Record 280.

But even as originally drafted this order of reference contains no consent that the Special Master should settle *questions of law* as was done in the cases above cited. But whether the order of reference is made with or without consent, the Master's report is open to exceptions even as to the facts, and certainly as to questions of law arising upon the introduction or rejection of

evidence or the misapplication of the true principles of law in a statement of the account. The objections to the Master's report in this case go almost wholly to questions of law, as will be seen in the discussion of those questions. As to the weight of the findings of the Master, see

Kimberly vs. Arms, 129 *U. S.,* 512; 32 *L. ed.* 764.
Davis vs. Schwartz, 155 *U. S.,* 631; 39 *L. ed.,* 289.
Tilghman vs. Proctor, 125 *U. S.,* 136; 31 *L. ed.,* 664.
Callighan vs. Myers, 128 *U. S.,* 617; 32 *L. ed.,* 547.

The Special Master's findings as to matters of law have no weight, and his finding of facts based upon misconception or misapplication of law will be reviewed without prejudice to the injured party.

The method pursued in ordering the reference in this case was as follows: The water company presented a draft of the order that it desired to have entered, containing eleven propositions. Objection was made by the city to this order, and thereupon counsel for the city presented the draft of an order such as they desired containing thirteen propositions or items. The Court, without passing upon or undertaking to pass upon the matters of controversy and difference between the parties and their proposed orders of reference, added to the eleven propositions submitted by the water company a twelfth proposition in these words: "The Special Master will report on any other special matter or question about which he is specifically requested to report by either side in writing within ten days after entry of

this order, said requests to be filed and made part of the record. In case an irrelevant or unnecessary inquiry is opened up by such request, the cost thereof will be taxed against the party making such request and the Master will report what, if any, needless costs are thus caused."

Thereupon and within the ten days' limit allowed by the Court, the city filed, pursuant to the Court's leave, its thirteen propositions, contained in its original draft of the order of reference, thereby placing before the Master both orders of reference, differing in material respects, and making it his duty to report upon the items of both orders without any effort on the part of the Court to settle any of the differences between the orders or to give any direction to the Master as to what were or what were not material matters for him to report upon. These orders of reference prepared by the respective parties are in many respects different. According to the correct practice the Court should have taken both orders and have settled what were the material questions of fact to be ascertained and reported upon instead of leaving this for the parties themselves or the Special Master to settle. As might have been anticipated, the taking of the evidence had not progressed very far until serious differences arose between counsel as to whether certain evidence was material and competent. Thereupon the water company presented a petition to the Court seeking to have the twelfth clause, added by the Court himself, to its order of reference stricken out, and to have the

draft of the order of reference presented by the city pursuant to said section either stricken out or construed and amended, insisting among other things, that the city should not be permitted to inquire into the extent of services and revenues of the water company subsequent to the date of the passage of its ordinance on March 31st, 1901, averring that any inquiry as to the revenues of the company subsequent to that date was impertinent and irrelevant, and praying that the Court "revise said twelfth clause of the original order of reference and the thirteen supplemental requests of the defendant, for the reasons hereinbefore stated, and for such other reasons as may be presented in the argument."

Record 119, 121.

Thereupon the Court, without undertaking to settle any of the controversies over the orders of reference as he was invited to do by the petition of the water company, struck out section twelve and substituted in lieu thereof, and upon his own motion, the following paragraph: "In taking the evidence and directing the inquiry before him, the special master possesses the usual power of masters in chancery, and *is hereby expressly invested with power and authority to determine what subjects are relevant and pertinent matters of inquiry under the foregoing order of reference,* and also the proper method of proceeding or requiring the production of evidence, and of what is primary or best evidence of any disputed fact, *and any and all questions arising in regard to the rele-*

vancy of any subject of inquiry and the right to call for or introduce any part of the evidence. The master will, of course, *determine such issues, and for that purpose will hear such arguments as satisfies him in regard to these matters.*"

Record 289.

The effect of this paragraph seems to have been to leave the whole matter, both as to law and evidence, to the discretion of the special master, without consent of parties and over city's objection. Whether it had the effect of striking out the propositions that the city had submitted and filed under section twelve, is not quite clear.

The effect of these proceedings was to transfer the hearing of this cause from the Court to the Special Master upon all questions of law, as well as of fact, without the consent of the city, and as a consequence, to leave the whole matter of law, as well as of fact, at large and in utter confusion, as will appear from an analysis of the so-called order of reference, and a comparison of the propositions contained in the plantiff's draft with those contained in the supplemental draft of the defendant. The Special Master, upon whom was imposed the burden of deciding this case, both as to matters of law and fact, was not himself a lawyer—a fact easily discoverable from his rulings on evidence and from his report. The fourth item of the plaintiff's draft of the order of reference is perhaps the only proper and pertinent one of

the eleven, as follows: "The value of plaintiff's entire plant and property at the time of the passage of the ordinance of March 30th, 1901." This item, however, was not justified under the averments of the original bill, which did not allege *value*, but *cost* of plant. And it omitted to confine the value to the property of the water company actually being applied to, and in use for public purposes at the date of the passage of the ordinance.

The defendant sought, by the first and third items of its supplemental propositions, to remedy this defect, and to have excluded from the valuation such property as was not being used or applied to public purposes at the date of the ordinance, and such as had been abandoned, or had become unfit or unsuitable,or inadequate for public use, or had become depreciated in value. But as it turned out on the statement of the account and decision of the case, this value of March 30th, 1901, was not at the *beginning of the year*, but at the *end of the year*, whose income and operating expenses were alone considered in testing the validity of the ordinance, and it appears that considerable additions had been made to the plant during the year preceding the 30th of March, 1901, that could not, during the year, have been productive of income or of operating expenses. Besides, interest was allowed during the construction period upon the money employed therein, and it does not appear what time in the year these additions to the plant were made. These conflicting propositions presented matter of law that the Court should have settled before the reference.

Record 122, 124.

As regards the income and operating expenses of the plant, the draft of the order of reference presented by the plaintiff and adopted by the Court, confines the inquiry to the time prior to March 30th, 1901. The defendant, by one of its additional and supplemental propositions, sought to have this inquiry extended to the period after the passage of the ordinance—its ninth propositions being to what extent the services, expenses and revenues of the complainant company have been increased since the passage of said ordinance of March 30th, 1901, stating the same annually. The Court should have settled the law as to these propositions, but it did not; but, when the defendant proposed to prove income and operating expenses of the water company under its own rates subsequent to the passage of the ordinance, it was objected to by defendant's counsel as it had been on making the original reference. The objection to the supplemental proposition was in these words:

> "This inquiry is as to extent that the services and revenues of plaintiff have been increased since the passage of the ordinance of March 30th, 1901. *This is clearly and grossly incompetent.*"

This objection was repeated in plaintiff's exceptions to evidence and in its petition to the Court to have the order of reference revised and construed, as follows:

> "The petitioner calls the attention of the Court to the fact that the ordinance contested in this cause was passed on the 30th of March,

1901, and that said ninth supplemental inquiry is directed exclusively to facts arising since the 30th of March, 1901. Petitioner is advised and alleges that any matter arising since said date, cannot properly be inquired into in this case, the investigation being limited both by order of the Court and by the law of the case to conditions that existed on or before March 30, 1901."

Record 123, 125, 115, 120, 127, 129, 132.

The Master in a written opinion filed during an early stage of the taking of the plaintiff's evidence, made the following ruling, to-wit:

"I have ruled that the most rigid examination of the expense account, and the vouchers thereof, *will be permitted for the year in which the ordinance attacked was passed, for all subsequent and for one year previous, in all, three years and six months. I do not consider that the expenses of complainant for any year previous to passage of the ordinance, have any bearing, as the question is, will the rates fixed by the ordinance yield a fair income on the investment after paying expenses. What happened in the previous years is not material. For comparison of expenses to test complainant's figures, the items of one previous year have been required.*"

Record 275.

What the Master means by "the year in which ordinance was passed" is the year immediately preceding

its passage. Notwithstanding this ruling and the further fact that evidence as to the income and operating expenses for one and a half years after the passage of the ordinance was taken and admitted, the Master refused to report "income" and "operating expenses" for any year except that immediately preceding the passage of the ordinance, and applied these to the value of the plant at the end of that year, and the Court sustained this action. It will be borne in mind that this ordinance had been passed more than eight months before the filing of the bill, and should have been in operation about eighteen months before the order of reference was made.

Upon the subject of "fair return" or sufficient income to permit or afford a fair return to stockholders, the plaintiff's draft of the order of reference in its eleventh section directed an inquiry as to whether the rates under the City Ordinance "would afford or permit a reasonable income on the *capital invested in its plant and property.*" The defendant's supplemental draft sought to have the inquiry made as to whether the rates under the City's Ordinance "were reasonable and would afford or permit a reasonable income on the fair value of the complainant's property actually being applied to, and in use for public purposes at the date of the passage of said ordinance, taking into consideration the rights of the public, as well as the rights of stockholders of said company;" and in its ninth section, it sought to have the Special Master report the increase in the revenues of the company since the passage of the ordinance.

Record 123, 124.

The Court should have settled the question whether the fair return should be upon the amount invested, or upon the value of the plant, but did not do so.

As to depreciation: The plaintiff's draft in its tenth proposition sought to have the Special Master report the amount to be allowed annually to the water company for depreciation from natural causes, and by wear and use and depreciation accrued to March 30, 1901. This inquiry should have been extended to the year and a half after the passage of the ordinance, if proper at all, which is not conceded.

The other propositions in the plaintiff's draft were as to mere matters of evidence wholly immaterial. Of the latter class is the inquiry as to the parts of the plaintiff's plant that were situated inside and outside the city, which should have been entirely stricken out.

In the execution of an order of reference of this character, it was to be expected that the Special Master, who was not a lawyer, should fall into many errors, and that much confusion should ensue in the taking of evidence, as well as in the consideration of the case by him.

The Special Master made a report covering the whole field of law and evidence, to which both parties filed exceptions, raising many questions, chiefly of law, to be disposed of.

The Court over-ruled all of the city's exceptions, and the action of the Master was sustained by the Court, both on the hearing of the exceptions, and on the petition for rehearing and other subsequent applications and

proceedings, and this is assigned as error on this appeal.

It is proper in this connection to state, in a general way, the evidence offered on the hearing before the Master, being the only evidence heard in the case.

Under the order of reference, if it may be called such, the Special Master had freedom of choice as to which of the two dozen issues, or propositions submitted by the parties, he would hear evidence and report upon, if any of them, and the right, if he chose to do so, to ignore all of the issues and propositions submitted by the parties, and proceed upon his own ideas of what were, or should be the material issues to hear evidence and report upon. It was not known in advance, even to the Special Master, as shown by his conflicting rulings, and much less known to the parties themselves, what would be regarded as the controlling questions in the case. The city and its counsel were under the same necessity of "striking in the dark" in defending the ordinance, as it had been in passing it, and from the same cause. Unquestionably the burden of proof, and the heaviest burden imposed in any class of civil case, rested upon the water company to make out its case by competent and satisfactory proof of every pertinent and material fact essential to its obtaining relief, and as the Court is called upon to set aside, as invalid, on account of its unreasonable and confiscatory character, legislative action fixing rates, after the water company had been heard before that body, and after a full and fair investigation of the facts had been made by that body, it is not sufficient for the water com-

pany to show a state of facts merely upon which the Court might decide the matter diferently from the legislative body, especially where the water company has been in default, and has itself induced the mistake, if any was made by the legislative body, by its own misconduct. It is not sufficient, under the cases to be hereinafter cited and reviewed, for the Court to conclude that there is a conflict in the evidence, or that there is a mere preponderance in favor of the water company, or that the water company supports its case by opinions of two or more witnesses. The evidence must go beyond this to justify the Court in setting aside, as invalid, the action of the legislative body.

The Special Master has found in his report that there is a "wide variance" that "admits of little reconciliation" between the evidence offered on behalf of the water company and that offered on the part of the city. He admits that the witnesses on both sides are reputable, and as to the pertinent and controlling facts, the numbers are about equal.

Record 166, 167.

He determines the case upon expert opinion evidence, giving, as we think, undue weight and significance to this character of evidence, and erroneously following the opinions of the water company's experts, which, on the pertinent issues, was opposed by an equal number of experts on the part of the city.

Upon this state of the record, as found by the Special Master, there being conflicting evidence—evidence of

about equal value on both sides—the bill should have been dismissed.

As will appear from the evidence that was introduced on behalf of the water company, this case has been investigated along wholly erroneous lines. Most of the evidence offered by the water company, as will appear from what follows, was clearly incompetent and irrelevant. The water company offered only the following evidence in chief as to the value of its plant, the crucial question in the case:

First: An estimate of "invested value," consisting, not of a statement of what had actually been paid into the treasury of the company, and used in the construction of its plant, but *an estimate* by its officers, made without consultation of its books, and without knowledge of the facts, of what the plant should have cost.

Second: An estimate of the replacement cost of the plant as it existed on the 30th of September, 1902, eighteen months after the date of the passage of the ordinance. The whole of the evidence in chief as to the value of the plant, consisted of these two statements.

The purpose of the "invested value" statement, was to show by *estimate* merely, not by actual facts, what the plant had cost; that is, an estimate of what had been invested in it from time to time in the construction of its several parts at the dates such parts were created, and at the prices then prevailing, and including therein, the estimated cost of parts that had been abandoned for public use, or had utterly perished and been replaced, and

duplicating the cost of such parts, by including estimated cost of such replacement.

It was contended by the officers of the company, who made and furnished this "invested value" statement, that it afforded the basis of value, upon which a fair return should be computed. Of this "invested value" statement, the Special Master says:—

> "The manner in which this is presented, shows great ability, care and thought. Complainant's counsel have devoted much of their able brief to this subject. Still, I can see no aspect of this case in which it is material. In some views, the theory would seem to be 'exact justice' but to hold to it would make a precedent, whereby the regulation of rates would become impossible."
>
> *Record* 169.

This "invested value" statement, which is misnamed "Classification and *Fair Construction Cost* of the Physical Plant of the Knoxville Water Company to March 31st, 1901," covers more than fifty pages of the printed record.

Record 332-394.

As will appear from an inspection of it, it purports to give, in great detail, the cost of construction of all parts of the plant, whether in existence at the date of the ordinance or not, from the inception of the plant until the 31st of March 1901, lumping the period from 1883 to

1891, and giving the estimated cost of construction by the year from 1891 until 1901. Such a statement, if made from the books of the company or after the ascertainment of actual facts, while it would fall far short of showing the value of the plant on the 31st of March 1901, would have been of some, though very slight, evidential value; but when made up, as this was, by officers of the company, without consulting, and refusing to consult the books of the company, from their general experience as experts, without knowing, for the most part the facts, or making any effort to ascertain them, it is scarcely worthy of consideration upon the real issue in this case.

This "invested value" statement was made up by William Wheeler, President, and F. C. Kimball, Superintendent of the water company, who testified as experts.

Of the nature of this "invested value" statement, the Special Master says: "The values are *estimates* by experienced hydraulic engineers."

Record 166.

Mr. Kimball says: *"Everything in this analysis is an estimate."*

Record 868.

He further testifies as follows:

> "Q. Have you, at any time, joined with Mr. William Wheeler, the President of the Knoxville Water Company, in preparing a statement or analysis of the property of that company, for the purpose of ascertaining its fair invested value?

A. Mr. William Wheeler and myself worked together over an analysis of that description last summer and fall, covering perhaps eight or ten weeks.

Q. In preparing that analysis, did you follow the books of the company, or make an independent analysis?

A. The analysis was made independent of the books of account of the company.

Record 811.

Mr. William Wheeler says that in making this "invested value" estimate he "carefully avoided making use of, or referring to account books," and that he made this analysis upon "information and experience as water works engineer and expert generally."

Record 470, 472, 682, 683.

These witnesses—officers of the company—admit that the books of the company, or of Wheeler & Parks, Contractors, were in the possession of William Wheeler in the very building where this analysis was made up, and that they showed prices of pipe and other material entering largely into the construction of this plant, and that they did not, on a single occasion, avail themselves of the aid of these books in fixing unit prices, or for any other purpose, but carefully avoided doing so.

Record 837, 838, 470, 472.

These interested witnesses purposely and deliberately shut their eyes to actual facts, in order to make mere estimates of prices, having the actual prices avail-

able in these books. Not only did these witnesses refuse, on making this analysis, to look to these books, but they refused persistently, during their cross-examination in this case, to produce the books to enable counsel to test, by actual facts, the accuracy of their estimate of prices. Mr. Wheeler is asked on cross-examination: "Do you think that actual cost is better than *estimated cost?* A. I *do not.*" He further says: "*Actual value is a vague term to my mind.*"

The officers of the company, it seems, had radically changed their minds with reference to estimates, or opinion evidence, subsequent to the request, made by the Chairman of the Water Committee when fixing rates by ordinance, for the valuation it fixed upon its plant, to which the water company replied that any answer that it could make "would be only an *expression of personal opinion, to which any one might, and doubtless with great propriety, well take exception.*"

Record 823, 1070.

This "invested value" statement of the value, or supposed value of the physical plant of the water company, including its real estate, aggregated $711,379.51. After this statement had been made up by the officers of the company and testified to by them, or at least one of them, three expert engineers were secured by the water company for the purpose of giving their endorsement to the same, and to the methods pursued in making it up. These were Hider, Ludlow and Johnston. These gentlemen were

furnished with copies of this statement of the officers of the water company. They were all strangers to the situation at Knoxville. They came to Knoxville, and after spending a few days, from a week to ten days in investigation of the situation, with the aid of the officials who made up the statement, they took the stand and in a general way gave a half-hearted approval, suggesting no changes therein. Hider says that he understood that the prices had been taken from the water company's books, which was not a fact.

Record 996.

Ludlow thought it was unnecessary that prices should be estimated where there existed books that showed actual prices.

Record 559.

On cross-examination Ludlow says that he didn't understand that he was approving the statement as a whole. These witnesses to a very large extent took the word of the water company's officials as to quantities and prices. Not only the officials of the company, but these experts likewise testified as to the law of the case, and all agreed that this *invested value*, and not *actual value*, is a proper basis for ascertaining reasonable rates.

In order to ascertain what weight should be attached to this "invested value" statement, as showing the true basis of value, to-wit, actual value as of March 31, 1901, it is only necessary to observe: In this invested

value statement is included, according to Mr. Wheeler's own statement, $95,987.04 of consummated depreciation; that is, the value of such property or its estimated value entering into the statement, such as buildings, pipe, pumps, etc., as had utterly disappeared from the plant on the 31st of March, 1901; $77,726.51 incomplete depreciation; that is, such value as had gone out of the existing parts of the plant by reason of the fact that they had been in use for many years, such as pipe, pumps, filters, etc.; and $2,000.00 on account of the Tillery tract of land that had ceased to be used for the benefit of the plant, making in all $175,713.55 of the estimate that had wholly gone out of the value of the plant for public use. This would reduce the amount to $535,665.96. But, in addition to this, the estimate was at prices based upon the opinion of the company's officials at the time the construction work was done. In nearly every instance, these prices were in excess, and largely in excess, of actual prices prevailing on the 31st of March, 1901. For example, the cast iron pipe entering into the original construction of this plant, and into the construction for several years after it was established, is put into this estimate at $35.00 per ton, with 20 per cent. added for contractor's profits, engineering and interest on money during construction period, making it $42.00 per ton. There was a large quantity of this pipe that enters into this estimate at this price. The price of pipe at the date of the passage of the ordinance was little, if anything, in excess of $20.00 per ton. The reservoir enters into this estimate at $33,000.00, including the 20 per cent. above noted. The proof shows,

beyond all question, that its actual cost could not have exceeded one-half this amount.

An item of $2,000.00 for tools, etc., inserted in this estimate, was based upon no fact or knowledge of facts as admitted by the water company's officials that made the estimate.

Record 846-848.

And throughout this entire estimate the proof shows that the prices assumed from general experience of these experts are largely in excess of the actual prices prevailing at the time.

Entering into this estimate is an item of over $32,000.00 for engineering, and an item of over $65,000.00 for contractor's profits. The general effect of this statement is to corrobate strongly the evidence of the city's experts, fixing the cost of this plant at about $400,000.00 on the 31st of March, 1901.

As to the replacement cost of the plant as of September 30, 1902, it is difficult to discover or suggest any reason why it should have been made to encumber this very large record.

The true date of inquiry as to actual value of this plant was, of course, March 31, 1901, eighteen months before the date of this estimate of replacement cost. At or about September 30th, 1902, the highest prices ever known prevailed as to cast iron pipe, the chief element of cost in the construction of a water plant. If it was not for this reason that this replacement statement was made of this

date, it is difficult to suggest any. At the time that this replacement statement was made the question was mooted among the experts of the water company as to whether one should be made as of the true date, March 31, 1901. A tentative replacement statement of that date was made up, but was not put in evidence.

Record 960-61; 2119-2120.

It happened that prices were normal, if not low, at the true date. Eighteen months later they were the highest ever known either before or since the true date. This may suggest a reason for the failure to put in a replacement statement of the true date.

This replacement statement of September 30th, 1902, was made up like the "invested value" statement, by *estimates of experts*, and without consulting the books for actual facts. It is open to the same criticisms, and even more serious criticisms than the "invested value" statement. The prices were all excessive. It included many things that were not in the original plant as constructed. It included a large amount of construction made after March 31, 1901. It included some things like service pipes that had been put in by the consumers themselves, or at their cost, and is objectionable in many other respects; but, it is sufficient to say that it is utterly without value in this case. It was made up by the same officials who made up the "invested value" statement, and approved substantially by the same expert witnesses who were furnished with a copy in advance of giving their testimony.

They likewise had knowledge that the officials of the water company had given evidence approving this replacement statement before they were called to testify.

There was little evidence, in addition to the above, introduced by the company in chief, except that a table of its indebtedness, of which something will be said later, was put in evidence by its treasurer, who likewise furnished tables of income and operating expenses, very ingeniously endeavoring in his testimony to transport as large amount as possible of the company's income to that portion of the plant lying "outside" of the city, and as large amount as possible of the expenses into the city.

The city presented as evidence in chief, a statement of the replacement cost of the existing plant as of the 31st of March, 1901. This was made by W. M. Nixon and C. S. Brown, two disinterested expert witnesses, after several weeks of investigation and calculation, going into the minutest details of cost and value. These experts fixed the replacement value, as of March the 31st, 1901, at about $400,000.00, which by reason of depreciation of the value of the material in the existing plant, was considerably reduced by the application of Mr. Wheeler's rules of depreciation.

There was proof likewise of the assessment value of this plant for taxes, which indicated an actual value of $357,500.00. The prices fixed by these experts were sustained by contractors and other persons familiar with the situation in Knoxville at the time of the original construction of this plant and ever since. Several witnesses were

examined who participated in the actual work done on this plant, or furnished material for its construction.

In rebuttal, the water company, presented a replacement statement of March 31st, 1901. This replacement statement contemplated an entirely new plant, composed of new material in all of its parts. This belated replacement statement was made up by Mr. Ludlow, who had figured in making former statements, and Mr. Wingfield, and without including real estate, amounted to over $618,000.00. These witnesses were furnished in advance of testifying an itemized statement with prices set opposite the items, of the estimated quantities of material at estimated prices that had entered into the construcion of the water company's plant. Mr. Wingfield, after three or four days investigation at Knoxville, was ready to take the stand and testify substantially to the correctness of this statement. He made all his investigations inside of a week. Mr. Wingfield says there is no difference between a *new* and an *old* plant, as to its *value*.

Record 1984.

Much of the material in this plant had been in use for fifteen to eighteen years, as will appear from the examination of these witnesses. They had no knowledge of prices of materials and labor at Knoxville. They drew upon their general experience. They took the statement of the water company implicitly as to quantities, and as to much of the statement, as to prices. Their examination of the plant was wholly perfunctory. While Ludlow dif-

fered from Wingfield and thought there was a difference between the value of a new and old plant, he does not undertake to fix the value of the existing plant.

Record 2129, 2131.

It happened that both of these experts, Ludlow, on behalf of the city, and Wingfield, on behalf of the water company, had testified in a reasonable rates case, known as the "Chattanooga case" about six months prior to the 31st of March, 1901. At the date of giving that testimony, prices were lower than on the 31st of March, 1901. These two experts had differed in fixing the value of the Chattanooga plant by the sum of nearly $400,000.00.

Record 1988-2082.

They, however, had no difficulty in getting together on the estimate in this case.

Record 2083.

Both of them testified on their cross-examination that as to very many of the matters involved, they took the statement of the officers of the water company. Almost without exception the prices fixed by these two experts in this case, were in excess of the prices fixed by them in the Chattanooga case, when prices were lower than in 1901. They were confronted on cross-examination with their depositions in that case and compelled, not without some humiliation, to acknowledge this. This was especially so

of Ludlow. We can only refer the Court to the cross-examination of these witnesses in support of our criticism of their evidence, and we submit that the effect of their evidence is to place the actual value of this plant, on the 31st of March, 1901, at about the same figure that was placed upon it by the city's experts.

It will appear from their statements and evidence that in several instances they put prices higher than was claimed by the water company, and included in their estimate many thousands of dollars for things, such as services, laying pipe under brick pavement, etc., as did not enter into, and was not claimed by the officials of the water company in their "invested value" statement to have entered into this plant.

It is proper to add that the water company claimed certain per cents for administration, for discounts on sales of bonds, for "going concern," applying these per cents to estimated value of entire plant, but these will not be further noticed on this occasion.

Taking the whole evidence together, we confidently assert that the value placed by the City Council upon this water company's plant, to-wit, $500,000.00, when it was investigating the matter of rates, without the assistance of the water company, was about $100,000.00 in excess of its true value.

B

When and to What Extent Courts Will Interfere With Rates for Public Utility Companies Fixed by a Legislative Body.

The power of the city to regulate the rates of this company has been fully settled by adjudications, and is not now in question. This Court has uniformly held that the fixing of rates for public utility companies, is primarily a legislative function, but it has declared that rates thus fixed may nevertheless, in certain extreme cases, be enjoined by the courts as unreasonable and confiscatory. This jurisdiction of the courts is not based upon any theory that the courts have a general revisory power over such rates when fixed by legislative action, but upon the idea that the courts may interfere when, and only when, the legislative body has proceeded in fixing such rates in violation or excess of its power, or has acted arbitrarily, fraudulently, or merely under guise and pretence of exercising its legitimate function, and thereby accomplished, practically, confiscation of private projerty. This Court has, by its decisions, carefully guarded and limited the exercise of this extraordinary and dangerous jurisdiction of the courts affecting legislative action, and has thus far permitted the most sparing use of it.

In three cases, and three cases only, so far as we have discovered, has this court sustained the exercise of this power and jurisdiction. In these three cases *the facts were either admitted or not seriously controverted in the*

evidence. In the first of these cases, Reagan v. Farmers Loan & Trust Company, 154 U. S., 362, 38 L. Ed. 1014—the pioneer case—this Court, on final hearing, enjoined the Texas Railroad Commission from enforcing rates, which upon the *admitted facts,* were clearly confiscatory in their character, and which the Railroad Commissioners, who were parties to the cause, did not undertake to defend, justify or palliate. The opinion of the Court in that case, delivered by Mr. Justice Brewer, leaves no doubt as to what the Court intended to decide, and did decide. It is as follows:

> "But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the *admitted facts* that the road cost far more than the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years *steadily decreasing* until the aggregate decrease has been more than *fifty per cent.;* that under the rates thus voluntarily established the stock, which represents *two-fifths of the value,* has never received anything in the way of dividend, and that for the last three years the earnings, above operating expenses, have been insufficient to pay the interest on the *bonded debt,* and that the proposed tariff as enforced, will so diminish the earnings that

they will not be able to pay *one-half of the interest on the bonded debt above operating expenses*, and that such an averment, *so supported*, will in *the absence of any satisfactory showing to the contrary*, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree restraining it will be put in force."

The Court carefully guarded its decision upon these facts, saying:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule that in every case *a failure to produce some profit* to those who have invested their money in the building of a road, is conclusive that the tariff is unjust and unreasonable, and yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, *without prejudice to the rights of others*. There may be circumstances which would justify such a tariff; there may have been *extravagance and a needless expenditure of money;* there may be *waste in the management of the road;* enormous salaries, unjust discriminations between individual shippers, resulting in general loss; the construction may have been *at a time when material and labor were at the highest price*, so that the *actual cost* far exceeds the *present value;* the road may have been unwisely built in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the right of the community in which the road is

built, as well as the rights of those who have built the road."

The reductions made by the Commission in that case, ranged from five per cent. to nearly fifty-seven per cent. on the various classes of articles.

In the next case, *Covington & L. etc., Company, vs. Sandford* 164 *U. S.*, 578, 41 *L. Ed.*, 560, this Court restrained, *temporarily*, the enforcement of rates prescribed by statute for a turn-pike company, as unreasonable and confiscatory upon the facts stated in the pleadings, the truth of which was *admitted*, showing that the enforcement of the rates would have disabled the company from performing its duties to the public, and from paying dividends to its stockholders, whose money had been legitimately used in the construction of its road, and would *entirely destroy the value of its property* and of its shares of stock, and would not afford an income sufficient *"to maintain the road and provide for its ordinary expenses without taking into consideration any extraordinary expenses."* No defense of these rates against these serious charges was attempted,—the case having been disposed of upon the pleadings, *whose averments were admitted*. The case was, however, remanded for proof, the Court saying:

"We decide, however, nothing more on this hearing than that upon the facts alleged, the demurer to the answer should have been overruled, and upon the completion of the pleadings,

> unless the plaintiffs elect to stand by their demurer, the parties should be allowed to make their proofs touching the issues involved."

The opinion in this case, rendered by Mr. Justice Harlan leaves no doubt as to what the Court intended to decide. The Court says:

> "The statute, which by *its necessary operation,* compels a turnpike company, when charging only such tolls as are *just to the public,* to submit to such further reduction of rates as will prevent it from *keeping its road in proper repair* and from *earning any dividends whatever* for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority under its charter to collect and receive tolls for passengers and freight."

It is further said that the allegations of the bill:

> "Made a *prima facie* case of the invalidity of that statute."

The opinion was carefully guarded in this case by the language:

> "It is proper to say that if the answer had not alleged in substance that the tolls prescribed by the Act of 1890, were wholly *inadequate for keeping the road in proper repair and for earning dividends,* we could not say that the Act

was unconstitutional, *merely because the company, (as was alleged, and as demurrer admitted) could not earn more than 4 per cent. on its capital stock.* It cannot be said that a corporation, operating a public highway, is entitled, *as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock.* When the question arises whether the Legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders *are not the only persons whose rights and interests are to be considered; the rights of the public are not to be ignored.* It is alleged here that the rates prescribed, are unreasonable and unjust to the company and its stockholders, but that involves *an inquiry as to what is reasonable and just for the public.* If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and consequently a diminution in the tolls collected, that is not in itself a sufficient reason, that the corporation operating the road should be allowed to maintain rates that would be *unjust to those who must, or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.* The Legislature has the authority in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway, estab-

lished and maintained under legislative authority. *If a corporation cannot maintain such a highway, and earn dividends for stockholders, it is a misfortune for it and one which the constitution does not require to be remedied by imposing unjust burdens upon the public.* So that the *right of the public* to use the plaintiff's turnpike upon the payment of such tolls as, *in view of the nature of the service rendered* by the company, *are reasonable, is an element in the general inquiry, whether the rates established by law are unjust and unreasonable.* That inquiry also involves other considerations, such for instance as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts, and when a court without assuming itself to prescribe rates is required to determine whether the rates prescribed by the Legislature for a corporation, controlling a public highway, are, as *an entirety* so unjust as to destroy the value of its property for all the purposes for which it was acquired, it is its duty to take into consideration *the interests of both the public and the owner of the property, together with all other circumstances that are fairly to be considered* in determining whether the Legislature has, under the *guise of regulating rates, exceeded its constitutional authority* and practically deprived the owner of the property without due process of law. What those other circumstances may be, it is not necessary now to de-

cide. That can be done after the parties have made their proofs."

In that case it may be observed there was no bonded indebtedness, and we submit the fact that the company is, or is not indebted, is wholly immaterial upon the question of a "fair return."

San Diego, etc., vs. National Cit, 74 *F. R.* 87.
San Diego Water Co. vs. San Diego, 62 *A. S. R.* 272.

In the remaining one of the three cases in which this Court has granted affirmative relief against rates alleged to have been confiscatory, to-wit: *Smith vs. Ames,* 169 *U. S.*, 466; 42 *L. Ed.*, 819, it was decided by this Court upon facts that were not, *and could not be seriously controverted,* that the state officials of Nebraska were properly enjoined from enforcing prescribed rates that would have denied to all of the railroads of the state, except two, an income sufficient to have saved them from actual loss in operation, and as to the two excepted roads, permitting an income only slightly in excess of operating expenses.

In that case the proceedings to enjoin the enforcement of rates were instituted before the rates had been put into effect. The opinion in that case, delivered by Mr. Justice Harlan, is likewise carefully guarded. After reciting the facts upon which the plaintiff's contentions were based, the court proceeds:

"Do these facts affect the general conclusion as to the probable effect of the Act of 1893? In the discussion of this question, the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, *at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations* and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation *equal to all these ends*, will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion, and as it bears upon each case in its important aspects, it should not be passed without examination. In our opinion the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the *fair value of the property used*, omits altogether any consideration of *the right of the public to be exempt from unreasonable exactions*, and makes the interests of the corporation maintaining a public highway, *the sole test* in determining whether the rates established by or for it, are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation, deriving its existence and powers from the state. Such a corporation was created for *public purposes*. It

performs a *function of the state.* Its authority to exercise the right of eminent domain and to charge tolls, was given *primarily for the benefit of the public.* It is under *government control,* though such control must be exercised with due regard for the guarantees for protection of its property. (Citing cases.) It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state must *fix its rates with a view solely to its own interests and ignore the rights of the public.* But the rights of the public would be ignored if the rates for transportation of persons or property on a railroad are exacted without reference to *fair value of the property used for the public, or the fair value of the services* rendered, but in order simply that the *corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization.''*

In that case, the Court was unwilling, while enjoining the operation of the statute upon the facts existing at the date of the passage of the statute fixing the rates, to make its decision final, and conclusive of the invalidity of the statute, and remanded the cause for further inquiry, saying:

"But it may be added that the *conditions of business*, so far as railroad corporations are concerned, *have probably changed for the better since the decree below*, and that the rates prescribed by the statute of 1893 may *now afford all the compensation to which the railroad companies in Nebraska are entitled*, as between them and the public. In anticipation, perhaps, of such a change of circumstances and the exceptional character of the litigation, the Circuit Court *wisely provided* in its final decree that the defendants, members of the Board of Transportation might *when the circumstances have changed so that the rates fixed* in the said Act of 1893, *shall yield to the said companies reasonable compensation for the services aforesaid, apply to the Court, by Bill or otherwise, as they might be advised for a further order in that behalf.* Of this provision in the final decree the State Board of Transportation, if so advised, can avail itself. In that event, *if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question, without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute.*"

See same cases, 64 *Fed. Rep.* 165; 35 *Fed. Rep.* 878.

It may be observed that in the case at bar, the city

was denied, upon its application, by petition showing material changes in its favor since the passage of the ordinance, any consideration of any matter occurring subsequently to the passage of the ordinance, and this in the face of the facts that the ordinance had then been in force more than eighteen months, and that the bill was filed more than eight months after the passage of the ordinance. It was likewise denied on its application, a reservation similar to that declared proper in the Court's opinion above cited. There is full proof in this record showing the conditions for one and one-half years after the passage of the ordinance, and showing affirmatively a very large increase during that period of the income of the water company.

The same rules have been applied by the inferior courts in granting injunctions of this character in *Cleveland, etc., Co. vs. Cleveland*, 71 *Fed. Rep.* 610; *New Memphis, etc., Co. vs. Memphis*, 72 *Fed. Rep.*, 952. In these two latter cases the facts were *admitted* to be as stated in the bill, and the rates temporarily enjoined were, upon those facts, clearly confiscatory.

In a note to the case of *San Diego Water Co. vs. San Diego*, 62 *Am. St. Rep.*, 302, we find the following:

> "In Reagan v. Farmers etc. Co. 154 U. S. 400; Covington etc. Co. v. Sandford, 164 U. S. 589; Cleveland etc. Co. vs. Cleveland, 71 Fed. Rep., 610; New Memphis etc. Co. vs. Memphis, 72 Fed. Rep., 952; Indianapolis etc. Co. vs. Indianapolis, 82 Fed. Rep., 245, and Smith vs.

Ames, 169 U. S. 528, *it appears either by admissions or by testimony of witnesses whom there was no attempt to contradict,* that the charges assailed were not merely unreasonable, but that *they were so extreme in character as to leave the corporation assailing them without any net profit for their services,* if such rates and charges were enforced. While we do not doubt that ultimately, when the question shall necessarilly arise, that the Court will, to some extent, undertake to require that the charges be adequate as well as reasonable, the inherent difficulties in determining what charges are to be deemed adequate are such that we can very rarely expect judicial interference against rates or charges *where there is any substantial effort made to defend them.* Even some of the general suggestions which have been made upon this subject must, we think, be abandoned. Thus, in several of the decisions, the amount of the bonded indebtedness of corporations was spoken of, and the courts seemed inclined to the view that such indebtedness and the interest agreed to be paid thereon, ought to be taken into consideration in fixing the rates of charges, but we think this suggestion is sufficiently answered by the opinions in the principal case, as well as that of *San Diego, etc. Company vs. National City,* 74 *Fed. Rep.* 87. It certainly cannot be material whether the corporation has used its own money or that which it has borrowed from others, nor can those who have loaned money be necessarily entitled to interest thereon if it has been injudiciously expended. To say, as is sometimes said,

that the present value of the property should be taken as a basis for the adjustment of rates, is but to reason in a circle, *for it is clear that its value is dependent upon the rates established, and must be high or low according to such establishment,"* etc..

Thus far, and thus far only, has this Court gone in its decisions granting affirmative relief in this class of cases. As indicated by its opinions, it has proceeded thus far with great caution and solicitude to prevent abuse of this jurisdiction by the Courts.

On the other hand the cases are numerous in which relief in cases of this character has been denied by this Court and by other courts.

In *San Diego, etc. Co. vs. National City,* 174 *U. S.,* 739, 43 *L. ed.,* 1144, this Court, Mr. Justice Harlan delivering the opinion, refused to enjoin rates prescribed by ordinance for a water company, saying:

"There is no ground to say that the appellant did not in fact have, or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and officers of the appellants. Those officers may not have been present at the final meeting of the City Board when the ordinance complained of was passed. They were not entitled of right to be present at that particular meeting. They were heard, and there is nothing to justify the conclusion that the

case of the appellant was not fully considered before the ordinance was passed."

The facts of the case at bar bring it strictly within this opinion. Again the Court says:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, *unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as under all the circumstances is just, both to the owner and the public.* That is, *judicial interference should never occur unless the case presents clearly, and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.* In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an *embarrassing one to a judicial tribunal, because it is primarily for the determination of the Legislature, or of some public agency designated by it;* but when it is alleged that a state enactment invades or destroys rights secured by the constitution of the United States, a judicial question arises, and the courts, Federal and State, must meet the issue, *taking care always not to entrench upon the authority belong-*

ing to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

It is a significant fact in that case that the evidence was conflicting, and that the Court in view of the presumption that obtains in favor of the reasonableness of rates prescribed by public authority, and of its reluctance to assail a statute as unconstitutional, says:

"It is sufficient to say that upon a careful scrutiny of the testimony, our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, *looking at them in their entirety, and we cannot properly look at them in any other light*, are such as to amount to a taking of property without just compensation, and therefore to a deprivation of property without due process of law. *There is evidence both ways*, but we do not think we are warranted in holding that the rules, upon which the defendant Board proceeded, were in disregard of the principles heretofore announced by this court in the cases cited. *The case is not one for judicial interference with the action of the local authorites, to whom the question of rates was committed by the State.*"

The Court quotes with approval this language:

"When the constitntion provides for the fixing of rates for compensation, it means 'reasonable rates' and 'just compensation.' To fix such rates and compensation is the duty and within the jurisdiction of the Board. To fix rates

not reasonable, or compensation not just, is a plain violation of its duty. *But the courts cannot, after the Board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably or grossly unreasonable and unjust as to amount to the same thing.*"

This case is peculiarly in point.

In *Railroad vs. Wellman*, 143 *U. S.*, 399, 36 *L. ed.*, 176, this Court refused to interfere with rates shown by agreed facts *supplemented by the opinion of two witnesses "well informed and worthy of credit"* proving that the rates would not yield an adequate income. Mr. Justice Brewer in delivering the opinion of the Court, said:

> "Can it be, under the circumstances, that the Court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate of two cents per mile, is unconstitutional? *Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared as a matter of law, that the reduction of rates necessarily diminishes income? May it not be possible, indeed, does not all experience suggest the probability that a reduction of rates*

will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and ignoring all other considerations, hold as a matter of law that reduction of rates necessarily diminishes the earnings?"

See also *Atty. General vs. Railroad*, 35 *Wis.*, 583.

In the case at bar, the special master and the Court, not only held, as a matter of law, that a reduction of rates would not result in an increase of business or income, but held this in the face of uncontradicted evidence to the contrary.

In *Stanislaus County vs. San Joaquin Company*, 192 *U. S.*, 201, 48 *L. ed.*, 406, this Court reversed the decision of the Circuit Court sustaining a bill by a water or irrigation company enjoining rates as unreasonable and confiscatory, which had been prescribed by the supervisors of a county. Mr. Justice Peckham delivering the opinion of that Court, says:

"It is not confiscation, nor a taking of property without due process of law, nor a denial of equal protection of the laws to fix water rates so as to give *an income of six per cent of the then value of the property actually used for the purposes of supplying water as provided by law, even though the company had prior thereto, been allowed to fix rates that would secure to it one and one-half per cent a month income upon the capital actually invested in the undertaking.*

If not hampered by an unalterable contract providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to *six per cent* upon the *present value of the property used for the public*, is not unconstitutional. *There is nothing in the nature of confiscation about it.*"

Again:

"*Much of the capital was invested between twenty and thirty years ago, and to be able still to realize six per cent on the money originally invested, is more than most people are able to accomplish in any ordinary investment, and more than is necessary in order to give just compensation for property at the time it is used for the public purpose originally intended.*"

The bill was dismissed.

In *Dow vs. Beidleman*, 125 *U. S.*, 680, 31 *L. ed.*, 84, this Court held rates not confiscatory upon the proof, which, it was insisted, would not yield a net income sufficient to pay as much as one and one-half per cent on the original cost of the road, and only a little over two per cent on its bonded debt.

In *Railroad vs. Gill*, 156 *U. S.*, 649, 39 *L. ed.*, 567, this Court, Mr. Justice Shiras delivering the opinion, sustained the judgment of the Supreme Court of Arkansas, refusing to interfere with rates as being unreasonable and confiscatory, saying:

"It therefore appears that the allegations made and the evidence offered did not cover the

company's railroad *as an entirety*, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts, we agree with the views of the Supreme Court of Arkansas as disclosed in the opinion contained in the record, and which were to the effect *that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads. That the company cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided,* nor attack as unjust a regulation which *fixes a rate from which some such part would be unremunerative, that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and in the receipts in which they participated and finally that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas.''*

In the same case it is said:

"The theory, apparently, upon which this suit is brought, is *that the parties have an appeal from the legislature to the courts, and that the latter are given immediate and general supervision of the constitutionality of the acts of the*

> *former. Such is not the case.* Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of the legislature, state or federal, and the decision necesarily rests upon the competency of the legislature to so enact, the Court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; *but such an exercise of power is the ultimate and extreme function of the courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest and vital controversies between individuals.*"

In the case at bar, the special master and the Court, divided the plant of the water company between "inside" and "outside" city, and assigned to "outside" city a far less per cent of operating expenses than to "inside" city as compared with the value of the plant assigned to "outside" city and "inside" city.

In *San Diego L. & T. Co. vs. Jaspar,* 189 *U. S.,* 439, 47 *L. ed.,* 892, this court, Mr. Justice Holmes delivered the opinion, denied relief to a water company seeking to enjoin, as unreasonably low and confiscatory, rates prescribed by the supervisors of a county, saying, among other things:

> "There is no allegation or suggestion *that the Board is corrupt, or that it purposes or intends without regard to evidence to adhere to the unjust rates so as to destroy or impair the value of appellant's works.*"

In the case at bar, should not the water company have made an appeal to the city, making full disclosure of the facts originally demanded by the city and refused by the water company, before appealing to the courts? The city acted fairly and endeavored to do right and invited cooperation of the water company, which was refused.

And again:

> "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. *It is enough if we cannot say that it was impossible for a fair-minded Board to come to the result which was reached.*"

And again, speaking of the value of property, it is said:

> "*If the supervisors were convinced by it (the evidence), we certainly could not say as a matter of law that they were wrong.*"

And again:

> "The valuation of property for purposes of taxation may not be technically evidence in a court of law, yet it may be considered in coming to a decision whether the action of the supervisors was unfair, especially if, as testified, it was sworn to by the officers of the company."

And again:

> "*We do not sit as a general appellate board of revision for all rates and taxes in the United*

States. We stop with considering whether it clearly appears that the constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one."

In *Railroad Company vs. Minnesota,* 186 *U. S.,* 257, 46 *L. ed.,* 1151, this Court sustained the schedule of rates attacked. So in the Florida cases, 203 *United States,* 256, 270 and in the Mississippi Railroad Commission case, 203 *United States,* 496, 51 *L. ed.,* 289.

In *Railroad Company vs. State,* 25 *Florida,* 310 *(S. C.,* 3 *L. R. A.* 661,) it is held that rates will not be interfered with by courts if there is room for *difference of intelligent opinion as to their reasonableness,* and that they will, in such case, be left to *the test of actual experiment.* To the same effect, see *Railroad Company vs. Dey,* 38 *Fed. Rep.,* 657; *Tilley vs. Railroad Company,* 5 *Fed. Rep.,* 662.

So this Court has refused to sustain the action of inferior courts restraining rates as unreasonable and confiscatory where the investigation reaching that result has been made in the lower courts *along improper lines.*

Railroad Co. vs. Tompkins, 176 *U. S.,* 167; 44 *L. ed.,* 417.
Railroad Co. vs. Inter-State Commerce Com., 162 *U. S.,* 197; 40 *L. ed.,* 940.
Cotting vs. Goddard, 183 *U. S.,* 90; 46 *L. ed.,* 101.

As a fitting conclusion to the discussion of the law in this case, we quote from the opinion in the case of *Cotting vs. Goddard, supra,* the following:

> "Now in the light of these decisions and facts, it is insisted that the same rule as to judicial interference must apply in cases in which a public service is distinctly intended and rendered, and those in which without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use. Obviously, there is a difference in the condition of these cases. In one the owner has intentionally devoted his property to the discharge of a public service; in the other, he has placed his property in such a position that willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the state, in the other in pursuit of merely private gain he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the state itself; in the other that he submits to only those necessary interferences and regulations which the public interests require. In the one he expresses his willingness to do the work of the state, aware that the state in the discharge of its public duties, is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecun-

iary loss, having in view a larger general interest. At any rate it does not perform its services with the single idea of profit. Its thought is the general public welfare. If, in such a case, an individual is willing to undertake the work of the state, may it not be urged that he, in a measure, subjects himself to the same rules of action, and that if the body which expresses the judgment of the state, believes that the particular services should be rendered without profit, he is not at liberty to complain. While we have said again and again that one *volunteering* to do such service cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt, which ultimately works its appropriation, still is there not force in the suggestion that as the state may do the work without profit, if he voluntarily undertakes to act for the state, he must submit to a like determination as *to the paramount interests of the public.*

Again, wherever a purely public use is contemplated, the state may, and generally does bestow upon the parties intending such use, *some of its governmental powers.* It grants the *right of eminent domain* by which property can be taken, and taken not at the price fixed by the owner, but at the market value. It thus enables him to exercise *the powers of the state,* and exercising those powers and doing the work of the state, is it wholly unfair to rule that he must submit to the same conditions which the state

> may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question," etc.

Water companies, under the laws of Tennessee, exercise the power of eminent domain. It is only by permission of the city first obtained that a city water company can obtain a charter. It can no longer be questioned that the water supply of a city is a matter of such public interest that the state, through its proper instrumentalities, may provide for and assume control of it. Companies undertaking to supply a city with water, as much as common carriers undertaking to supply transportation, must consult first the public interests, and secondly, their own.

We do not, and it is not necessary for us, to contend for the extreme, though entirely just, view contained in the above quoted language. The city in the case at bar, undertook, through its public authorities, after giving notice to the water company and affording full hearing, and after making for itself all possible investigations, and asking all necessary information from the water company, to fix just, fair and reasonable rates. It acted with due consideration for the interests of the water company as well as for the interests of the public. If it has failed to fix entirely adequate rates, which we insist it has not done, the entire fault of its mistake, or error of judgment, lies at the door of the water company, which failed, upon the city's demand, to furnish necessary in-

formation about its business, which it was entirely competent and proper for the city to demand, and which it did demand. This we submit is not a case where the rates fixed by the city should be interfered with by the courts.

Another consideration which it seems ought to have some weight in determining cases of this character, should be noticed in this connection. In some of the cases it seems to be assumed that the "just compensation" to which public utility companies are entitled, as a "fair return," is synonymous with the "just compensation" to which the owner is entitled, where his property is condemned and *taken* for a public use, and that the mere *denial of reasonable profits* to a public utility company, is the same thing as the *taking* and appropriation of the *corpus* of the property for the public use. We submit that there are essential differences between the two cases, and while the same rules are, or may be applied in both cases, these rules do not apply to the same extent in the cases of *denial of "fair return"* as in cases of absolute *taking* and *appropriation* of property.

The owner's right to "just compensation" where his property is *taken and appropriated* for a public use, is absolute and well defined. "Just compensation," in that case, is full and fair market value of the property taken. The "just compensation" to which he is entitled is fixed by the uniform standard of fair market value, and the owner's right to this compensation is absolute and unconditional. It is susceptible of easy proof and

ascertainment. The public takes and acquires title to the property. In cases where the property itself is not taken but merely subjected by the public utility company to the use of the public, while it remains the owner, and controls the use of the property, the claim for "just compensation" is of an entirely different nature. The right to "just compensation" in such case is not absolute and unconditional, but dependent upon many contingencies. In some special cases it has been, or may be denied, altogether. It is not susceptible of exact ascertainment by any fixed standard, even in cases where it is allowable. In its ascertainment, the rights of the public, as well as of the owner, are to be consulted, and the rights of the public to service at reasonable rates, is considered as paramount to the rights of the owner to earn dividends or profits. The courts consider, not merely the value of the property in such cases, but the nature and value of the services rendered. In such cases the public acquires no title to, nor interest in the property, and only a limited control over its use or the price of its use by the owner for the public benefit.

The same considerations distinguish appraisement cases for the purpose of sale, from reasonable rates cases. To illustrate our meaning, take the plant involved in this case: If a sale of the plant were proposed to a purchaser, the price should be fixed at the full value of the plant, including its franchise, right to use the streets, and all its properties, whether used for the public benefit or not, or whether actually bought by it or donated to it by the city, or by the inhabitants of the city. But,

in fixing rates under the contract between the city and the water company, and ascertaining their reasonableness as between the inhabitants of the city and the water company, we submit that there are elements of value actually in the salable value of the plant, which ought to be excluded from its valuation for this purpose. For example, reasonable water rates as between the city and consumers who are inhabitants of the city, cannot justly be burdened with the value of the water company's franchise and use of the streets, which were granted and donated to the water company for the purpose of enabling it to furnish water cheaply under its contract. It appears in this case that many thousands of dollars entering into the salable value of this plant, consist of property that has never been used for the public benefit, or its use for that purpose utterly abandoned. Manifestly the value of this class of property, while properly entering into the salable value of the plant, can have no place in a valuation of the plant made for the purpose of fixing reasonable rates.

Again, under the water company's contract with the city, it had the option to impose or not to impose upon the water consumers the burden or expense of putting in connections, known as "services," between the mains of the company and the consumers premises. Under the election and rules and requirements of the water company, the water consumers of the city put in these services at their own expense, that expense aggregating more than $30,000.00. Whether these services are the property of the water company, or of the consumers who

paid for them, is a controverted question in this case—the water company insisting that their cost or value shall enter into the valuation of the plant, upon which a "fair return" to the stockholders must be made, while the city maintains the contrary. But, regardless of this question, and of the question whether these services enter into the salable value of the plant, it seems clear that they should not enter into any valuation of the plant made for the purpose of fixing reasonable rates, except so far as it may be necessary to provide for their maintenance. It would be inequitable and unjust to burden the water consumers with the value of any element, even belonging to the plant, which they themselves have wholly contributed. The element of value contributed to the plant, commonly known as "going concern" affords another illustration, and especially so under the facts of this case. Undoubtedly "going concern" enters into the salable value of a plant, and should be considered in fixing price, either by agreement or appraisement for a sale. It is, however, in any case an intangible value, and a very uncertain and difficult matter for consideration. In this case, water consumers made their applications for water service at the office of the company. Little, if any expense was incurred by the company in securing patronage, but such as was incurred, was paid as an operating expense out of the income of the company, contributed by consumers. It was the voluntary and liberal patronage of the public that gave this plant any value on account of "going concern." The cost of "going concern" has been paid by the people, or contributed by

public patronage. Is it just or equitable that rates of consumers should be further increased and burdened on account of their liberal patronage of the company? Moreover, the value of "going concern" depends upon, or largely upon the fact whether the company is able to command a profitable business. It may, without fault of the public, be unable to do this, and then its "going concern" is wholly without value. "Going concern" or its value depends upon the rates charged, without regard to their reasonableness. The higher the rates ordinarily, the more valuable is the "going concern." Thus consumers may be compelled to pay higher rates by reason of the fact that existing rates are and have been excessive. It would seem that "going concern," beyond its actual cost to the company, should not be capitalized for the purpose of increasing rates. If "going concern," or its value, is capitalized for the purpose of determining reasonableness of rates to be charged, without regard to the reasonableness of the rates that creates its value, then the city in its effort to regulate rates, is in the situation of the man who endeavors to lift himself over a fence by tugging at his boot-straps. The water company has only to increase its rates—make them more excessive, and thereby increase the value of "going concern" and thereby augment the value of its plant, to defeat proposed reduction of rates, however just and necessary.

C

Discussion of Questions Relating to Fair Return—Facts and Law.

To determine whether the rates prescribed by the City ordinance, and the income that has been, or probably will be derived thereunder, are of such character and amount that the Court must interfere to set them aside as confiscatory, it will be necessary to determine, if not with mathematical, at least with approximate certainty, the following questions:

(a-1) The earnings or income that have been, or probably were, or will be realized from the operation of the water company's plant under the ordinance:

(b-1) The amount of operating expenses that have been, or probably were, or will be necessary and legitimately incurred in the operation of the water company's plant under the ordinance:

(c-1) What amount or per cent, if anything, has been or will probably be necessarily and legitimately required or expended for the maintenance of the plant in such aspects as are not properly chargeable to construction account as permanent extensions, additions or replacements, or to operating expense account.

(d-1) The fair and reasonable actual value of the plant at the date of the passage of the city ordinance, to-wit, March 30th, 1901.

(e-1) Whether the rates fixed by the ordinance, and the earnings and income yielded thereunder, have been, or probably will be "clearly and beyond all doubt" so low, unreasonable and insufficient, as to indicate such "flagrant attack" upon the property of the water company, as constitutes its confiscation—looking in the settlement of this question, not merely to the mathematical results, but to all the circumstances shown in the evidence, the value of the services rendered as well as the value of the plant, and to the interests of the public, as well as to the interests of the water company; and whether, in view of the situation thus disclosed, the court will be compelled in order to prevent confiscation of the water company's property, to set aside as unconstitutional and invalid the ordinance passed by the city council in the exercise of its conceded legislative authority, exercised conservatively and deliberately after notice and full hearing and investigation. These are the chief issues to be determined, but other questions may be incidentally involved in the determination of this case. These questions should be considered by the court as of the same date, to-wit, March 30th, 1901, and from the same point of view that the city council had to consider them in passing the ordinance.

The water company has persistently refused to put the city's rates to the test of actual experiment—a test that would have conclusively settled all questions as to income and operating expenses thereunder. This court is therefore under the necessity, as was the city council,

to make a "strike in the dark" and to settle these matters by speculation and probabilities, to some extent at least, based upon the uncertain and conflicting evidence and opinions of expert witnesses.

Inasmuch as the *bill avers,* and the Special Master seems to have *understood,* as indicated by his report, that the burden of proof is not upon the water company, but upon the city in settling these matters, it will not be improper to repeat in this connection that the burden of proof upon all material questions and issues in the case, undoubtedly rests, under the decisions of this court, upon the water company.

This burden is the heaviest that rests upon any litigant of a civil case. The court indulges, for obvious reasons, the strongest presumption in favor of the validity of legislative action, and will not lightly interfere to annul or set aside such action as unconstitutional. It is held in "reasonable rates" cases that "such a question is always an embarassing one for a judicial tribunal, because it is primarily for the determination of the legislature, or some public agency designated by it" and that the courts will take care "always not to entrench upon the authority belonging to a different department, nor to disregard the statute, unless it be unmistakably repugnant to the fundamental law."

San Diego &c. Company vs. National City, supra.

It is further held that the courts will not, and should not review the action of a legislative body, as upon an

appeal. "It is enough, if we cannot say that it was *impossible* for a fair-minded Board to come to the result which was reached."

San Diego &c. Co. vs. Jasper, supra.

> "But the courts cannot, after the Board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified, because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in the fixing of the rates, or they must be so palpably or grossly unreasonable and unjust, as to amount to the same thing."
>
> *San Diego &c. Co. vs. National City, supra.*
> *San Diego &c. Co. vs. Jasper, supra.*

It will be helpful, before entering upon the discussion of the specific errors assigned on this branch of the case, to state the result that must be reached, assuming the correctness of the Special Master's findings as to value of plant, amount of income, and operating expenses, and of the per cents of reduction of income by the city ordinance, and the per cents for maintenance, depreciation, and fair return.

The Special Master treated this case as one to be settled my mere mathematical calculations of amounts and per cents. The findings as to these are as follows, to-wit:

Value of plant, March 30th, 1901, being the date of the passage of the city ordinance..$608,427.95

Entire income of plant realized under the water company's rates, for the fiscal year beginning March 31st, 1900, and ending March 31st, 1901—the year *preceding* the passage of the ordinance.....$ 88,481.39

Estimate of income that would have been realized during the fiscal year 1900-1901, under the rates prescribed by the city ordinance .. ..$ 70,857.75

Operating expenses for the fiscal year 1900-1901 which accrued under the water company's rates without any reduction for the difference in rates .....$ 34,750.91

The per cents that he fixes are as follows, to-wit:

For reduction of water company's rates by the city ordinance rates .....22.88 per cent

For maintenance of plant, commonly called "depreciation fund" .....2 per cent of value of plant

For "fair return" ....6 per cent on value of plant.

These are likewise the figures insisted upon and proved by the officers of the water company.

The Special Master refused to report, or in any way consider the income and operating expenses of the plant for the fiscal year 1901-1902, the first year of operation after the date of the city ordinance, although the same had been fully proved. He does not report whether opera-

tion under the city ordinance would have had the effect to reduce to any extent, operating expenses.

Report, Record 165-187.
E. Wheeler, 712-717.

Taking, but not conceding, that these findings of the Special Master as to amounts and per cents are correct, and that it was proper to test the validity of this ordinance by the amounts of income and operating expenses that accrued in the operation of this plant under the water company's rates for the year *preceding the passage of the ordinance,* ignoring utterly the amount of income and operating expenses that accrued in the *year next succeeding the passage of the ordinance,* the results that must follow can be ascertained by a calculation, so simple and easy that a school-boy, who has learned to cipher to the "Rule of Three," could ascertain them without difficulty. These results are as follows, to-wit:

Income of entire plant at the water company's rates, for the fiscal year 1900-1901—the year *preceding the passage of the ordinance*	$ 88,481.39
Estimated income under city ordinance rates for the same year	$ 70,857.75
Operating expenses for the same year under the water company's rates—no reduction being made on account of the reduction in income by the city ordinance	$ 34,750.91
Net balance, after deducting operating ex-	

penses from the amount *estimated as being realized under the city ordinance,* leaves for allowances for maintenance or depreciation, fixed by the Special Master at 2 per cent, and for fair return, fixed by the Special Master at 6 per cent of the value of the plant ..... $ 36,106.84

This net sum of $36,106.84 estimated as resulting from the operation of this plant, during the year *preceding the passage of the ordinance,* at city ordinance rates, will pay upon the several valuations of the plant *as of the end of that year, 30th of March* 1901, the following per cents, to-wit:

On the Special Master's estimate of value—to-wit: $608,427.95 ..... 5.948 per cent.

On the city's estimate of the value of the plant, made at the date of the passage of the ordinance, to-wit: $500,000.00.. 7.158 per cent.

On the replacement estimate of the city's experts, Brown and Nixon, to-wit: $400,000.00 ..... 9.027 per cent.

On the replacement estimate of the water company's experts, Wingfield & Ludlow, to-wit: $618,000.00 ..... 5.841 per cent.

Can it be said, that even upon the Special Master's figures and findings, waiving all question as to their correctness, and as to whether the ordinance should be tested by the income and operating expenses of the plant during the year *preceding,* or the year *succeeding its*

passage, the City Council prescribed rates so "palpably and grossly unreasonable and unjust" as to indicate fraud or bad faith on their part; or that it prescribed rates of a character that would operate to confiscate the property of this company? Can it not be justly said, upon these findings and figures, as was said by this court in one of the cases cited, that "there is nothing in the nature of confiscation about it?"

Stanislaus County vs. San Joaquin Co., supra

In fact, do not these figures and findings show that the City Council made a surprisingly conservative and just estimate, not only of the value of this company's plant, but of the rates that would yield it a fair and reasonable income, under the circumstances, especially in view of the action of the water company, in refusing to afford that body any assistance whatever, in arriving at the value of its plant, the amount of its income, or operating expenses or other essential facts? There is nothing in these facts to indicate hasty, fradulent or prejudiced action on the part of the City Council—nothing to indicate fraud or bad faith.

In the matter of income the City Council estimated it, when passing the ordinance, at $75,000 to $80,000. The Special Master reports that the water company's receipts from water collections alone for the year *preceding* the passage of the ordinance was $83,481.39, and this

was not the full amount. The bill admits $88,649.67, and that falls short of the entire amount.

Bill Record 12.
A. S. Birdsong, 1079-80.

The simple and obvious result, above indicated, that inevitably follows from the Special Master's findings of the material facts in the case, was missed by him in consequence of his adoption of certain methods suggested and used by the president and treasurer of the water company and followed by him in dividing the *invested value* of the plant and the amounts of its income and operating expenses between "city proper" and "outside city."

These methods afford convincing evidence of the ability and ingenuity of their inventors and discoverers as water works experts, and it is not at all surprising that the Special Master, busy as he must have been, settling with the aid of the water company's experts, the law of the case, framing new orders of reference from time to time and revising his rulings on evidence, etc., should have committed the error of following the methods suggested by such eminent authority.

It may be doubted whether any division of the value, income and operating expenses of this company's plant or of its income and operating expenses between "city proper" and "outside city" should have been made unless it should have been done, as was done in the Chattanooga case, for the purpose of placing a

heavier burden of expense upon the more expensive service rendered to water consumers outside the city than upon "city proper" consumers. They should probably have been considered as an entirety as the most equitable and reasonable disposition of these matters. The water company had never made or kept any such separation until one was made for the purposes of this case. Such separation is in fact an impracticable thing, involving, to make it now, an amount of detail work that makes verification of the water company's figures impracticable, if not impossible. Having commingled these practically inseparable matters, the water company is in the situation of one who commingles his goods with those of another. The separation of income is not proved by the persons who actually did the work, but by the statement of the treasurer who testified without personal knowledge and upon the information of others. And his statements are supported, in some measure, by like statements of the general superintendent of the company, the value of whose testimony may be determined by the fact that he verified the bill filed in this case by his oath. It may be, though it is not conceded, that the city cannot regulate rates of consumers to whom water is delivered "outside city." But this fact cannot be availed of for the purpose of increasing burdens upon water consumers in the "city proper" for the benefit and advantage of either the water company or its outside consumers. It would seem under the special circumstances of this case that the entire rates of this com-

pany, whether for water furnished "outside city" or in "city proper" are subject to regulation by the city. Before obtaining its charter the water company was compelled to obtain the consent of the city, and it did so.

Acts 1877, *Chapter* 104, *Record* 104-5.

Consent to use the streets was likewise required and obtained.

Acts 1877, *Chapter* 104.

Its charter upon its face contemplates furnishing water "to the inhabitants of said city and the environs thereof."

Charter, Record 103.

With the exception of one stand-pipe and a portion of the distributing pipes the entire plant of this company is situated within the "city proper" and has at all times been used to supply water to all consumers whether within the "city proper" or "outside city." Its reservoirs, pumps and pumping station, filters, engines, etc. are inside the "city proper." The city donated to the company the use of its streets for the laying of its pipes and other purposes to supply consumers both within the "city proper" and "outside city."

Under these circumstances the water company should not be permitted to make use of the fact, that it furnishes water to consumers "outside city," to the prejudice of

consumers within the "city proper." If any division of its plant, income and operating expenses should, under these circumstances, be made, which we do not concede, it must be such division as is fair and equitable to consumers within the "city proper." Such division cannot be made a pretext to maintain unjust rates in the "city proper." The subtle and ingenious methods by which the Special Master, following the lead and suggestion of the water company's officials and the results thereby reached will now be analyzed. The value of the plant as of 30th of March, 1901, was fixed by the Special Master as an entirety at $608,427.95. In dividing its value by the per cents fixed and ascertained in William Wheeler's "invested value" estimate, the Special Master assigns of this value 93.83 per cent.—$570,887.95 to "city proper," and 6.17 per cent.—$37,540.00 to "outside city." It might be supposed that this division of the value of the plant was made for the purpose and as a basis for the division of income and operating expenses between "city proper" and "outside city;" but as will appear these per cents were not used for either of these purposes. The division between "city proper" and "outside city" of income and operating expenses was made by other but not uniform methods. The purpose for which this division of the value of the plant was made will be disclosed in the sequel. The Special Master fixed the entire income of the plant at the water company's rates, for the fiscal year 1900-1901—the year *preceding* the date of the passage of the ordinance, at $88,481.39. It would seem that a fair and equitable basis for the division of this income between

"city proper" and "outside city" would have been effected by the use of the same per cents. that were used in the division of the value of the plant. However, that was not done. Another method was adopted. If the per cents. used in division of value of plant had been used in the division of its income "city proper" would have received 93.83 per cent—$83,022.09 and "outside city" would have received 6.17 per cent.—$5,459.30. But as the division was actually made by the officials of the water company and accepted by the Special Master the "city proper" gets $78,148.31—88.322 per cent, and "outside city" gets $10,333.08—11.678 per cent.

E. Wheeler, Record 713-741.

It is obvious that this division of income was grossly unjust to "city proper," carrying out of "city proper" and conferring upon "outside city" $5,073.78 of income in excess of its due proportion according to value. This was done upon the theory that an actual calculation had been made of the receipts on water collections from "outside city" and that these amounted to $10,333.08. This sum, thus illegally carried out, bears none of the burdens laid upon "city proper" rates.

The treasurer of the water company who presented the statement of receipts from consumers "outside city" admits that he did not personally make it up and that he does not know who did that work. He admits that he knows nothing of its correctness and says it would take

months of detailed work to get its items together or to verify it.

E. Wheeler, Record 743-4.

The general manager who made oath to the bill in this case, gives like testimony upon this point. The persons who actually made up this statement are not put upon the stand. The Special Master, however, accepted it as the basis of his report, intimating that the burden was upon the city to show its incorrectness. It will be found a little difficult to believe that the scattered consumers in "outside city" actually contributed such a disproportionate amount to the revenues of this company unless, as sometimes happens, the consumers "outside city" were manufacturing plants located just outside the city limits to avoid city taxes, and in that case almost the entire expenses of delivering the water is incurred and the work done within the "city proper." Is this method of dividing income between "city proper" and "outside city" equitable or fair?

The entire operating expenses of the plant, at the water company's rates, for the same year was fixed by the Special Master at $34,750.91. He does not suggest, and possibly there may not have been, any considerable diminution of operating expenses on account of the reduction in rates. It would seem fair and equitable, certainly so as to outside consumers, that operating expenses should have been divided between "city proper" and "outside city" either upon the basis of per cent

adopted for the division of the value of the plant or of the division of income. This, however, was not done. It must be conceded that the able and experienced officials and experts of the water company have shown no disposition to deprive the "city proper" of its full and liberal share of operating expenses.

Departing from the per cent. method by which division of the plant between "city proper" and "outside city" was made, and also departing from the method of ascertaining by actual division of amount received in "city proper" and "outside city" as was done with reference to income, the treasurer of the water company found or invented a new method for the division of operating expenses. To have adopted a per cent might have invited invidious comparisons. The separation of operating expenses by the method pursued as to income, was impracticable as it was with reference to income. But it was more objectionable, no doubt, to the treasurer because it would have carried "outside city" too large an amount of operating expenses. His object when dealing with income was to give the largest possible sum to "outside city;" his object in dealing with operating expenses was just the opposite, to-wit: to relieve "outside city" of as large a sum as possible and lay it upon the "city proper." The method actually adopted, differing from the method pursued in any other instance, though somewhat arbitrary, was not on that account less effective. In the division of operating expenses he assumed and exercised as the rule of division and the only rule applied, his own free

discretion. He reasoned that as the plant had already been created and had to be run, in order to supply consumers within the "city proper," and that consumers "outside city" could, in view of this situation, be supplied at small additional cost, that therefore "outside city" should bear only such additional cost as might be entailed in supplying them with water, leaving upon consumers in the "city proper" the burden of maintaining the plant that was used for this joint purpose. It was not overlooked, of course, that this method would result in giving "outside city" for the benefit of the water company or for the benefit of outside consumers a very large per centage of profit at the expense and to the prejudice of water consumers in the "city proper." The Special Master adopted the views of the treasurer and applied them in his disposition or division of operating expenses. If the same per cent. or proportion of operating expenses had been assigned to "outside city" as had been of income, the amounts would have been "city proper" 88.322 per cent—$30,692.69; "outside city" 11.678 per cent—$4,058.21. But the Special Master pursuing the treasurer's method assigned to "city proper" $32,800.98, and to "outside city" the remainder of the $34,750.91 allowed by him as operating expenses of this year, making $1,950.93.

The Special Master finds in accordance with the treasurer's estimate that 5.4 per cent of operating expenses should be assigned to "outside city" and the remainder to "city proper," and refers to the table put

in evidence by the treasurer as illustrating the manner in which this result is reached. We quote from the treasurer's testimony the following on this point:

"Q. Please say whether or not you have distributed the expenses under the different headings under which the accounts are ordinarily kept, and if so state the expenses for the year from April 1st, 1900 to March 31st 1901 under said several items first for the entire plant and then for the city proper?

A. The several sub-divisions of operating expenses are the ordinary sub-divisions as kept upon our books and the sum total of such expenses, to-wit:

$35,775.89 is made up of the following items:

	ENTIRE PLANT	CITY PROPER
Alum	$ 1,310.00	$ 1,157.68
Expense	2,976.16	2,916.64
Fuel	5,431.15	4,796.79
Insurance	564.43	547.17
Filter Station	2,270.28	2,247.58
Pump Station	3,948.19	3,908.71
Repairs	3,287.82	3,074.11
Salaries	7,805.06	7,024.55
Taxes	8,182.02	8,161.73
Totals	35,775.89	$33,834.96"

E. Wheeler, Record 714-15.

He explains that he assigns 99 per cent. to "city proper" and 1 per cent. to "outside city" under the head of filter station, being "ample to cover cost of *oil waste and*

reduced (increased) *period of artificial lighting incident to reduced* (increased) *pumpage and filtration.*" He applies the same rule to pumping station for the same reason. He explains that he charges of expense 98 per cent. to "city proper" and 2 per cent. to "outside city" because not over two per cent. would be saved if outside business where *cut off* and that the *extra expense of doing outside business was nothing material beyond per centage of stationery and printed bills incident to the number of services outside city limits.* The entire taxes, except about $20.00 on real estate outside city which had been abandoned by the water company, were assigned to "city proper." These serve to illustrate the treasurer's methods. While "outside city" contributes one per cent. only to the large items for maintaining and operating filter and pumping stations, and nothing to taxes, it takes under these divisions 11.7 per cent. of the income amounting to $10,333.08. It needs no argument to show that such division and distribution of income and operating expenses is grossly unjust. Having thus divided income and operating expenses, withholding from the "city proper" its due proportion of income and onerating it with an undue proportion of expenses, the Special Master reached the conclusion that there would remain to the "city proper" after disposing of income and operating expenses according to the foregoing divisions, a net income of $30,532.42. At this point the Special Master found his only use for the per cents and amounts by which he divided the plant between "city proper" and outside city." Out of this net fund the city was required to satisfy the demands of depreciation

fund and of fair return upon $570,887.95 or the whole value of the plant except the $37,540.00 assigned under the division to "outside city." For no other purpose in his report did he use the per cent. or amounts by which the plant was divided. The result was that the net income thus assigned to the city yielded only 5.35 per cent on the value of plant assigned to "city proper" for depreciation and fair return, while under the method of treating the entire plant and its value, income and operating expenses as a unit, there would be a sufficient net income to pay 5.948 per cent upon the value of the whole plant. The Court erroneously assumes that counsel agreed that the net income, even as found by the Special Master, would pay only $3.35, unless he thereby means to say this per cent is left after deducting 2 per cent. for depreciation. Another result of the Special Master's methods was that the water company while receiving only 5.35 per cent. for depreciation fund and fair return on the valuation of the plant, assigned to "city proper" it received about 23 per cent. on the value of the plant assigned to "outside city."

We submit that the fairer, simpler and more equitable treatment of the matter was to consider the plant, its income and operating expenses as an entirety. That certainly would be a basis of which outside consumers could not complain, as the delivery of water to them must of necessity be somewhat more expensive as a rule, than like delivery to consumers within the "city proper."

Nesbit Wingfield, 2052-2053.

There is nothing equitable or just in permitting the water company to receive 23 per cent on the value of its plant "outside city" and at the same time to demand 8 per cent. to satisfy depreciation fund and fair return on value of its property in "city proper," especially as the water company owes its charter and existence to permission granted by the city without compensation and to the use of the streets of the city which were donated to it. The statement may be challenged that the water company receives nearly 23 per cent. on the value of its property assigned to "outside city" but the assertion can be verified by attention to these figures to-wit:

Value of plant "outside city".....	$37,540.00
Income "outside city".....	10,333.08
Operating expenses "outside city"...	1,950.93
Net revenue after deducting operating expenses "outside city".....	8,382.15

which pays precisely 22.35 per cent on the value of the plant "outside city."

In the Chattanooga case where division between "city proper" and "outside city" was made, "outside city" was assigned 15 per cent of income and burdened with 20 per cent of operating expenses. There is an equity in favor of "city proper" consumers as against "outside city" consumers.

Nesbit Wingfield 2052-3.

The position and claim of the water company in this

case is well illustrated by an anecdote. Two Tennessee lawyers collected a joint fee, by taking, in payment, a horse. One of them kept and fed the horse several months before it was sold and demanded payment therefor out of the proceeds of the sale before division. He was gravely informed by the other lawyer that *his end* of the horse had not eaten anything.

In the discussion thus far we have assumed the correctness of the Special Master's findings of value of plant and of amounts of income and of operating expenses for the fiscal year 1900-1901, the only year for which he reports income and operating expenses. It is not our purpose to question any finding of fact as unsupported by evidence unless the result has been reached by the application of erroneous principles of law or is contrary to the solemn admissions of the water company or its higher officials found in the pleadings or the evidence. The court will not be asked to settle mere conflicts of evidence upon any point. It is admitted that the proper date for fixing value of the plant is the date of the passage of the ordinance, to-wit, 30th of March, 1901. The value of the plant at that date was the highest that it had ever attained and was the value contemplated by the city council in the passage of the ordinance and in its investigation looking to its passage. Value of plant at an earlier date must have been less and therefore unjust to the water company. Value of plant at a later date could not be known or anticipated by the city council, and there were no data by which it could be fixed. The water company could change value of plant at its will by extensions and additions. These

the city council was under no obligation to anticipate. Additions and extensions judiciously made are supposed after their completion to take care of themselves by earning a sufficient revenue. During the period of construction they are provided for by an interest allowance on the cost of construction in the construction account.

The objection to the Master's report is not, that he fixed an improper date, but that he reported not the value of the existing plant but replacement cost of an entirely new plant, and that he applied this replacement cost not to the income and operating expenses of the year *succeeding* the passage of the ordinance, but to the income and operating expenses of the year *preceding* its passage—a very important matter, as about $79,000.00 of construction was done during the preceding year that yielded no revenue, or little revenue, during that year, and the income of the plant for the succeeding year was something over $8,000.00 in excess of the income of the preceding year.

There is and must be an essential difference between the value of the existing plant composed of material, machinery etc. which had long been in use and much deteriorated, and the replacement cost of an entirely new plant of the same character composed of new and fresh material, although Mr. Wingfield, the water company's chief expert, says there is no difference between the value of the old plant and the replacement cost of the new, and in this view the Special Master seems to have concurred.

That the Master's report is not of the *value* of the old plant, but of *replacement cost of a new plant,* dis-

tinctly appears. He follows closely, if not literally, the items and in most instances the prices of Mr. Wingfield's statement of replacement cost, as will appear by comparison of the two statements. He embraces such items as "cleaning door and frame" and "contingent allowance for bad bottom," a mere hole or the contingency of a hole in the bottom of the reservoir, and both he and Wingfield figure into their statements as the probable cost or value of this hole, or contingency of a hole, the sum of $2,000.00. These items serve to indicate the character of the Special Master's statement. There are, however, others of the same kind.

Report, Record 170-175.
Nesbit Wingfield, 1954-1961.

As a result of his failure to distinguish between *value* of the *existing plant* and *replacement cost* of an entirely *new plant* of a similar character, the Special Master figures into his statement, mis-named valuation of $608,427.95, several items, which though entirely proper in an estimate of replacement cost at the date of the passage of the ordinance, are yet not entitled to consideration in fixing the actual value of the existing plant for the purpose of determining the reasonableness of rates to be charged to the water company's consumers under the contract between it and the city. Some of the larger of these items will be noticed. There are two items aggregating over $12,000.00 for the restoration of brick paving in laying pipe and putting in "service connections."

At the time the existing plant was constructed and its pipe and service connections put in there was no brick paving or no substantial amount of brick paving in the city, and no expense or very little expense was actually incurred or paid by the company in laying pipe or putting in service connections under brick pavement. To restore the plant or rebuild it on the 30th of March, 1901, a considerable amount of brick pavement would have been encountered and considerable expense on that account would have been incurred in the replacement of the plant. The pipe laid under brick pavement would cost more, but would be little, if any, more valuable than when laid under macadam or soil. In fact the cost of maintenance would be enhanced. It is conceded that in the estimate of replacement cost this item was properly included, but as no such thing, at least to any great extent, entered into the construction or cost of the existing plant, it should not enter into the value of this plant or be accepted as evidence to the extent of this item of the value of the plant for the purpose of testing the reasonableness of rates. Replacement cost is but evidence tending to show value of an existing plant. It is not itself value. Its weight as evidence depends upon circumstances, and where the replacement cost embraces items not in the construction cost of the original plant, though proper in the replacement cost, its weight as evidence of value is to that extent impeached. Any other view of this item would compel the city to pay a penalty to the water company for the improvement of

its streets in advance of the city's inflicting any damage thereby upon the water company.

Another item of like character, aggregating $38,724, estimated cost of putting in service connections between the mains of the water company and the property of consumers, though properly placed in the estimate of replacement cost, is fictitious when placed in the value of the existing plant to the extent of over $31,000.00. There is no controversy over the fact that all of the cost of service connections except about $8,574.00 was borne and paid by the water consumers themselves. The water company put in the service connections and was paid therefor to the extent above indicated by the water consumers.

Waiving as immaterial the question whether these service connections paid for by the water consumers become a part of the water company's plant and its property, we submit that this donation by the water consumers of $31,000.00 cannot be capitalized by the water company and be made the basis of value of its plant upon which it can demand of the water consumers who made the donation a fair return. In his estimate of invested value of this plant Mr. William Wheeler, with whom Mr. Kimball concurred, excluded from that estimate the cost of service connections put in by consumers.

Wm. Wheeler, 332, 493-498.

They fixed as the amount that the water company was entitled to claim for service connections put in at its own cost the sum of $8,574.00

Mr. Wingfield in his estimate of replacement cost of plant in the Chattanooga case excluded service connections entirely as having been put in at the cost of consumers and says the same should be done in this case. He represented the water company in that case as he does in this.

Nesbitt Wingfield, 1994.

It would seem questionable even whether the water company having put in service connections for a part of its consumers could justly require other consumers who had put in their service connections at their own cost, to contribute fair return upon the cost actually incurred by the water company in putting in service connections for favored consumers. It constitutes a palpable discrimination and operates unjustly and to the prejudice of consumers who have been compelled to pay the cost of their own service connections.

Under the rules and regulations of this company, a copy of which is made exhibit to the bill, consumers are required to pay $10.00 for each service connection put in and the expense of keeping the same in repair.

Record 56-59.

Another item, to-wit, "going concern" estimated by the master at $60,000.00 and entering into his statement of value or replacement cost of plant is of similar character. Undoubtedly going concern constitutes an element

of salable value. The question here is, can going concern under the circumstances of this case, be capitalized and enter into the value of the plant as a basis for determining the reasonableness of rates, and if so to what extent. If going concern can be considered at all in a case of this character, it must be the "going concern" of the plant while receiving, not excessive, but reasonable rates. To capitalize the "going concern" of a plant that has been and still is exacting excessive rates, thus making the value of going concern greater, would be manifestly unjust. That would enable the company to take the benefit of its own wrong and to make heavier the present burdens of water consumers by reason of the fact that they are and have been in the past paying excessive rates.

The actual cost to the water company of creating "going concern" would seem to be a just and reasonable basis for fixing the amount at which it should enter into an estimate of value of plant upon which to determine reasonableness of rates. In this case "going concern" has cost the water company little or nothing; having a monopoly in furnishing water to the inhabitants of the city it has never been under the necessity of resorting to advertisements or agents to secure patronage, and having under the decisions of this state the effective means of collection by cutting off water when payment is not made, it has been at no expense in securing business or making collections. But whatever expense it has incurred or paid has been returned to the water company in the annual allowance of operating expense which has already been contributed by the people. The basis of

"going concern" in this case is the voluntary patronage of the city under its contract and of the people. From the first, the city contributed toward "going concern" in hydrant rental $3,750.00 per annum, which has been increased until now it amounts to $11,455.00 per annum.

Record 26, 713.

Let us suppose as an illustration that the city had contracted originally and had at all times maintained such income to this company as would afford a fair return, would the water company in such a case be entitled as against the city and its inhabitants to have its "going concern" capitalized and enter into the value of its plant for the purpose of determining the reasonableness of its rates? But if the value of going concern is to be considered and there is to be a division of this plant and its income and operating expenses between "city proper" and "outside city," then should not the value of "going concern" be assigned almost wholly to "outside city" where the water company received nearly 23 per cent upon the estimated value of its plant. "Going concern," or its value, is dependent very largely upon the rates that the company actually charges, whether reasonable or unreasonable, and upon the amount that the company earns or is capable of earning at such rates.

Mr. Wm. Wheeler makes two efforts to fix value of "going concern." The first estimate is an arbitrary per cent based upon his "invested value" statement and based upon the estimated cost of every thing that had

ever gone into the plant—including the $175,000.00 that had gone out of the plant and many gross over estimates. This is an entirely arbitrary per cent. His other estimate is even more arbitrary, being made without reference to value of plant, or its operating expenses. Both estimates omit any consideration of the fact that the city under its contract as to hydrant rental, and the people by their patronage contribute to "going concern."

Wm. Wheeler, 329, 398-9, 443, 534, 2137-2142, 2174-2178.

But if "going concern" is what he defines it to be, the claim has been paid and satisfied by the city and the public.

W. M. Nixon 1388-9, 1814-15, 1827-8, 1831-1836.

Another item entering into the Master's estimate of value which is wholly fictitious is the allowance of $2,000.00 for a hole or a contingency of a hole in the reservoir. The Special Master by reason of his misconception of the law that the burden of proof is not upon the city but upon the water company, has fallen into very serious errors in making up his statement of value or replacement cost, which he seems to have regarded as synonomous. He admits on the face of his report, in several instances, that the prices at which he places certain items were high but he nevertheless allowed them. For example, he places cast iron pipe, the largest item of cost entering into the plant, at $23.50 per ton, admit-

ting that the evidence showed, as it did, that the water company at that time was paying for pipe in small purchases only $22.60 per ton, and the evidence in the record showed incontestably that the fair average price of pipe for several years prior to the 30th of March, 1901, did not exceed from $20.00 to $22.00 per ton and that its price at that date did not exceed $18.00 to $20.00 per ton.

J. S. Brown, 1936, 1939, 1945, 2058.
W. M. Nixon, 1341-1344, 1407-1412, 1432, 1436.
Nesbitt Wingfield 2062 *(chart.)*
J. L. Ludlow, 952-53.

Another item of "excavation and embankment" for reservoir he estimates at 13,000 yards at 40 cents per yard, $5,200.00, when the contractor who did the work shows that there were only 10,000 yards for which he was paid at the rate of 12 1-2 cents per yard, and in this he is confirmed by the books of the water company.

Lawson Irwin, 1210-1214.
W. M. Nixon, 1319, 1320, 1418, 1482, 1488, 1820.

And several contractors and mechanics living at Knoxville and familiar with prices, and who had measured the reservoir, prove that the yardage at 10,000 was correct and the price of 12 1-2 cents reasonable. The Special Master followed Wingfield and Ludlow in this matter, who were not familiar with prices at Knoxville and did not make a very thorough examination of the plant before testifying. Mr. Ludlow put in two state-

ments, at different dates, in regard to this reservoir, estimating in one of them 16,000 yards at 50 cents and in the other 13,000 yards at 40 cents, showing the loose character of his estimates.

The concrete lining for reservoir which did not exist in the original construction at all is estimated at an equally, if not more excessive, price.

The intake tower is estimated by the Special Master at $10,723.25. This work was constructed by the company and an itemized statement of its costs on the books of the company shows that it cost $8,855.33. To this amount the Special Master adds $2,185.75 as the contractor's profits, although the work was done direct by the company under the supervision of its salaried officers and paid employees.

Report, Record 172, 176, 177.

If this item of contractor's profits is added to actual cost of the work done by the company through its salaried officers and paid employees, should not the same amount be added to income account of the company?

The excess of the Special Master's allowance for stand-pipes is even more striking. He admits that the price fixed by him seems high, but nevertheless adopted it. His estimate for laying pipe was clearly excessive and he admits that his figures were full and high, but he nevertheless adopted them.

For engineering he allows $23,820.97. The evidence shows that not exceeding one-half this amount was actually paid for engineering in the construction and exten-

sions of this plant. Much of the engineering was charged to operation and paid as operating expenses and in this way engineering is made to play a part both in swelling the construction account or cost and in swelling the operating expense account. This method makes engineering perform a double duty for the water company.

The item of $10,000.00 for promotion and organization is a very questionable one. There was considerable proof as to defects in this plant. The Special Master refused to consider such evidence in making his estimate of the value of replacement cost of the plant. We submit that the Court could not say, upon this state of the record, if it were trying the case as upon appeal that the estimate of the value of this plant by the city council at $500,000.00 was too low. Certainly there is nothing in this evidence of value of plant calculated to raise any presumption that the city council acted fraudulently or in bad faith in fixing the value of the plant at $500,000.00 for the purpose of regulating rates. But even if the Court should find that the city council had made a mistake of judgment in this respect, that would not afford any reason for setting aside this ordinance, and such mistake would be entirely excusable, and one of which the water company would not be permitted to complain, by reason of the fact that it refused even an estimate or opinion as to the value of its plant, either in its original bill or in answer to the demand of the city for information.

The Special Master reported as income of the plant for the fiscal year 1900-1901, the year *preceding* the pas-

sage of the ordinance, the sum of $88,481.39. The bill admits the sum of $88,649.41. He refused for reasons hereinafter examined to report or consider for any purpose the income of the fiscal year 1901-1902, the year immediately succeeding the passage of the ordinance. What he does report is not the *earnings*, but the net *water collections* made within the year 1900-1901. He omits from the amount that part of the earnings for that year represented by the excess of uncollected water accounts carried out at the end of the year over the amount brought in at the beginning of the year amounting to $208.79. The amount of this excess carried out at the end of the year 1901-1902 is $1065.93. These amounts were not as the Master supposes, old and uncollectible accounts, but monthly or quarterly water accounts falling due on the 1st of April, 1901.

E. Wheeler 713-714.
W. M. Nixon 1385-1387, 1811-1812.
F. C. Kimball 906, 2216, 2229-2232.

There were undoubtedly other revenues for both of said years that were not disclosed or included. Mr. Nixon, the city's expert, found on the books of the water company two accounts carried as income accounts, to-wit, "taps" and "supplies." On the taps account there were balances showing profits for the year 1900-1901, $878.45, and for the year 1901-1902, $2,395.00; and on the supplies account there were like balances for the year 1900-1901 of $1,503.91, and for year 1901-1902, $2,646.89.

W. M. Nixon 1320-1321, 1834-1835, 1810-1812.

No satisfactory explanation of these "taps" and "supplies" accounts was made by the officials of the water company. Mr. Kimball undertakes to make an explanation, but as usual without examination of the books. His statements are general and indefinite. That there were revenues other than water collections for both of said years that were not disclosed by the officials of the water company is apparent from their statements. William Wheeler, president of the company, being interrogated in regard to this matter stated "There may be some receipts repaying the company for disbursements on account of installation of service or meters or for rents thereon which are intended to support such investment, but such information will have to be obtained through the treasurer."

Record 557.

As disbursements for the purpose stated are carried into the operating expense account, the receipts referred to in Mr. Wheeler's answer ought to be carried into income account.

Elbert Wheeler, the treasurer of this company, replying to the questions whether the average expense or income per meter or "service" could be ascertained by dividing income or operating expenses by the whole number of meters and services, replied: "It may be, but this does not give a fair average of domestic services, because the city's hydrant rental is included in the aggregate income, and there are very *large items of income* which

should not affect any statement of the average income derived from ordinary domestic or manufacturing services."

Record 745.

What are the other large items of income referred to in the above answer of the treasurer?

F. C. Kimball admits that the income reported was not the amount of earnings but "the actual *water collections.*"

Record 906.

Mr. Kimball further states in reply to a question, as to the sources of the water company's revenue, as follows:

"The revenue of the company, so far as it passes through my hands, is from water rents, from occasional sales of material on hand, from the charges for service pipes put in, in one case, for the rent of land owned by the company, and such other moneys from sundry sources, the nature of which in addition to what I have already stated I cannot now recall, that may be paid into the local office."

He was then interrogated and answered as follows:

"Q. Well, you qualified your statement by saying, 'so far as it passes through my hands.' Are there any revenues of the company that do not pass through your hands?

A. I cannot state what revenues the company have that pass directly to the treasurer, but I am satisfied that no revenues from water or the local operation of the plant come to him through me.

Q. Well, have you a knowledge of any other revenues that go to the treasurer?

A. If by revenues you mean money in any form whatever obtained, he undoubtedly does have revenues of which I am not conversant, but nothing that I know of in shape of direct earnings.

Q. Well, is there anything in the way of indirect earnings that you know of?

A. Nothing unless—nothing that I know of.

Q. Well, what do you mean in this last answer?

A. Nothing that I know of is my answer to that question.

Q. What did you have in mind when you said *"unless?"*

A. *I cannot analyze my mind to that extent at present, General Pickle.*

Q. Haven't you some knowledge or information that there are other matters that go into the hands of the treasurer that do not pass through your hands, and didn't you have such a source of revenue in mind when you used the word *"unless"* up there?

A. I have answered that question to the best of my ability."

Record 898-899.

It is just to Mr. Kimball, however, to say that he subsequently discovered and testified that he had nothing in mind when he made the above answer.

Unless the balances on "taps" and "supplies" accounts found on the books and proved by Mr. Nixon constitute the revenues other than actual water collections referred to in the foregoing answers of the water company's officials, such additional revenues are not disclosed in this record. The Special Master treated this case as one to be settled by mere mathematical calculation, using income and operating expenses, incorrectly ascertained, of the year *preceding the passage of the ordinance* as the *sole test* of its validity, refusing to consider or report whether a reduction of rates might or might not increase the consumption of water and possibly earnings of the plant, although the fact that such would be the result was abundantly shown by the evidence.

S. G. Heiskell, 1059, 1287.
A. S. Birdsong 1083.
W. M. Nixon 1398.

And the principle has the endorsement of William Wheeler 704, 2159; J. L. Ludlow, Record 970-971, and

was approved by the Special Master himself in one of his rulings in which he said:

"Well it is a well recognized fact that the cheaper the quality the more is used."

Record 1398.

And has received the endorsement of this Court, in *Railroad vs. Wellman, Supra,* wherein it is said:

> "Must it be declared as a matter of law that a reduction of rates necessarily diminishes income. *May it not be possible—indeed does not all experience suggest the probability that a reduction of rates will increase the amount of business and therefore the earnings.* At any rate must the Court assume that it has no such effect; and *ignore all other considerations and* hold as a matter of law that a reduction of rates *necessarily diminishes the earnings.*"

It may be said that the evidence on this question consists of mere opinions or estimates, but what proposition in this case advanced by the water company is not supported by that character of evidence? The water company having refused, and alone having the power, to subject the city's rates to the test of experiment is not in a position to complain of opinion evidence of this character.

The Special Master reported operating expenses of the plant for the year 1900-1901 at $34,750.91, but refused to report or consider them for the year 1901-1902. The water company claimed an aggregate of $35,775.89 as

operating expenses for this year. Two and only two items embraced in the amount claimed were disallowed. One, a small item for tax on real estate whose use had been abandoned, and a larger one for expense incurred in the consolidation with the L. B. plant, an expense clearly referable to construction account.

Report, Record 183-184.

The city, through its expert, Nixon, eliminated a large number of the remaining items aggregating several thousand dollars. These contested items are in part set out in the Master's report and all of them in the testimony of expert Nixon.

Report, Record 182-186.
W. M. Nixon 1363-1366.

By Mr. Nixon's deductions and eliminations the amount of operating expenses for this year was reduced to $30,827.52.

Record 1363-1366, 1811-1812.

Without undertaking to sustain all of expert Nixon's eliminations from this account it will appear at a glance that many of them must and should be sustained. The items are too numerous to be considered individually and can only be referred to by classes.

The operating expense account and its proper separation from construction account and maintenance or

depreciation account is one of the most vital and important questions in cases of this character. The operating expense account affords the most inviting field for ingenious manipulation. The lines of demarcation between this account and the construction account and maintenance and depreciation account are obscure and not very well defined. Items properly assignable to construction and items covered by the allowance for depreciation or maintenance may be easily and often are placed or rather misplaced in the account of operating expenses without losing their place in their proper accounts, and thereby perform double duty and at the same time impose largely increased annual burdens upon rates. For example, the rates must pay annually only six per cent, or some less per cent. on the value created by construction account as a "fair return," but if an item of construction finds its way into the operating expense account it must be paid in full. The same item is often embraced in both accounts and paid in full as operating expenses, and at the same time made to swell the construction account thereby created. So it may happen that an item of such character that it should be taken care of by the per cent. allowance for depreciation may find its way into the operating expense account and be there paid in full and notwithstanding this fact there would be no reduction of the per cent. for depreciation.

The rules of law applicable to operating expenses are well settled. It is held to be the duty of the Courts "To allow no item of expenditure which is not satisfac-

torily shown to be an actual and proper charge in the actual conduct of the business of supplying water, and when legal or other general expenses are claimed they must be shown to have had a proper relation to that business."

San Diego Water Co. vs. San Diego, 62 *American State Reports* 275.

Again it is said by this Court: "While the protection of vested rights of property is a supreme duty of the Courts, it has not come to this that the legislative power rests subservient to the discretion of any railroad corporation which may by unreasonable and exorbitant salaries, *or in some other improper way transfer its earnings into what it is pleased* to call "operating expenses."

Railroad vs. Wellman, Supra.

Again it is said: "It would seem as if expenditures for additions to construction and equipment as expenditures for original construction and equipment should be reimbursed by all of the traffic they accommodate during the period of their operations, and *that improvements that will last many years should not be charged wholly against the revenue of a single year."*

Railroad Co. vs. Interstate Commerce Commission 206 *U. S.* 441, 51 *L. Ed.* 1128.

In the same case it is said of the right of a shipper: "His right is immediate. He may demand a service. He

must pay a toll, but a toll measured by the *reasonable value of the services.* The elements of that value may be *many and complex,* not always determinable as we have seen, with *mathematical accuracy,* but we think it is *clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year,* and this is the principle for returns upon capital which exists in durable shape."

A public utility company must confine its expenditures to such as are legitimate for carrying on its business. It may not as between itself and the public take the same liberties as a corporation may assume as between itself and stockholders. Even between the company and its stockholders subscriptions to charitable objects, though calculated to advance the interest of a corporation, are not permissible.

McCreary vs. Chambers 48 *Ill. Appeals* 445.
Winfield vs. Bank 25 *Official Rep.* 812.
Davis vs. Railroad 131 *Mass.* 258 *(S. C.)*
41 *American Reports* 221 *and other cases.*

There are in the operating expense account of this year many items which should have been eliminated by the Special Master but were not. Such are the items of contributions to charitable purposes; the allowance of $30.00 each to officers or stockholders of the company for signing the bonds of officials; items of construction of a permanent nature, such as painting buildings, stand pipes, etc., that lasts for a number of years; items of expense

incurred in the litigation between the city and water company over the ordinance in question; items of insurance where the policy covers several years; items for salaries of engineer for whose services a full allowance is made in construction account; items based upon ingenious bookkeeping showing deceptive balances, etc.

If all improper items were eliminated from this operating expense account the estimate of the city council at $15,000.00 to $20,000.00 would not be far amiss, but if that estimate were too small it was the result of the fault of the water company in refusing to the city information demanded, and is more than made up by the excess of the company's income as found by the Special Master, over the city's estimate, to say nothing of the large advantage that accrued to the water company by reason of its failure to pay taxes to the city on a fair valuation of its property.

The contention of the city is not, that results of the preceding year cannot be looked to at all, but that they can be looked to, not as the *sole test* of the city's rates, but as evidence, tending to some extent, though remotely, to show what results would probably be attained in the subsequent year. This evidence is of considerable value when there has been no results from operation after the date of the ordinance, but of little or no value where the results of the subsequent year are, as in this case, actually known, and accurately ascertained.

The Special Master, in his somewhat lengthy report, disposes of the fiscal year 1901-2—the year *succeeding*

the passage of the ordinance and the year whose income and operating expenses must afford, when ascertained, the crucial and only satisfactory test of the reasonableness and adequacy of the city's rates—by a single brief paragraph in these words:

"The ordinance was passed March 30th, 1901, and the business year of complainant ends March 31, 1901. The bill was filed December 7th, 1901. It appears when the bill was filed no complete year of business had elapsed after March 30th, 1901. The order of reference clearly contemplated the year ending March 31, 1901, *not subsequent periods,* and it was not objected to on that account. I did not, and do not think, I should have admitted proof on any period *after March* 31, 1901. I so held, and defendant thereupon petitioned the Court as to the ruling of the Master. I was not present but was informed that on said petition the Hon. C. D. Clark said (not written) that he would not instruct the Master, but intimated a different view from that of the Master, and I thereupon admitted proof of the subsequent period and much of it is in the record. It seemed to be a misunderstanding as to the view of the Court though in the best of good faith. Upon learning this I thereafter excluded proof as to later periods and *have not considered it in this report.* I am quite of the opinion that an ordinance is supposed to fix rates upon facts then existing. 'The only fair judicial test is to apply the rates to the business that has been done in the past.' (35 F. R., 881)."

What was contemplated by the order of reference as that order was or may have been finally determined and

formulated in the mind of the Special Master under the plenary powers conferred upon him by the Court to settle for himself and report upon any questions that he deemed material and pertinent, counsel are unable to state. It is certain, however, that no order of reference contemplating that no inquiry should be made subsequent to March 31, 1901, was ever made or published by the Court or Special Master and in any way brought to the attention of counsel for the city without meeting with strenuous objection. In an effort to settle upon the original order of reference counsel for the city objected to the draft offered by the water company's attorneys, and by leave of the Court filed additional propositions that were made a part of the order of reference contemplating inquiry as to subsequent periods.

Record, 125.

And throughout the record it appears with possibly one or two variations that the Special Master by his rulings and once by written opinion admitted evidence over objection as to subsequent periods.

Record, 127-8; 263; 275; 698-9; 567-8; 743; 1320-21; 1473; 1685.

In fact the fullest evidence was admitted and is found in this record as to the year 1901-2 and the six months thereafter. If the Special Master had, as he insists in his repor. refused to admit evidence as to subse-

quent periods, or if the Court had, as he insists, limited the order of reference so as not to admit of such evidence, that of itself would have been palpable error. At all times wherever the question has arisen throughout these proceedings counsel for the city have insisted that the investigation should cover and be extended to at least the subsequent period of one year after the passage of the ordinance. The above statement of the Master was excepted to and challenged when brought to the attention of counsel by the filing of the report.

Record 159-60.

The same question was presented on the hearing, on petition to re-hear, on petition to recommit and by motion for reservation in final decree.

Record 204-208; 226-230; 293.

And was overruled by the Court in every instance upon the erroneous grounds stated in the Special Master's report.

Record 295; 308; 291; 289.

We assume that the proposition could not be controverted, that if it appeared that the water company had yielded to the city ordinance rates and thereby made actual test by experiment of their effect, and that it appeared from such test that the water company had realized from its operation under the city rates, for the period of a year after the date of the ordinance, a sufficient income to satisfy the demands of the law as to fair re-

turn, that such facts would put an end to this case, no matter what would have occurred or how inadequate these rates would have been when applied to the preceding year and conditions existing at that time. This actual test by experiment was not made. The water company alone could have made it and refused to do so. We have never contended, as the Circuit Judge seems to have understood us, that it was necessary for the water company to make this test before resorting to the courts, though it very clearly appears that it could have done so, without injurious consequences and at much less loss, than is entailed by this litigation. The next best evidence tending to show the effect of the city rates upon the income of this company is secured not by taking the income realized by the company under its own rates, in the year *preceding* the passage of the ordinance, during which $79,000.00 worth of construction was done *that yielded no revenue during that year,* but by taking the earnings of this company at its own rates during the year *succeeding* the passage of the ordinance and reducing such income by the most available method to the plane of the city rates. This can be easily done from the evidence in this record and from results of operation proved in the main by the officials of the water company. And these results will show beyond doubt that the city rates did yield to the water company a fair and adequate income. The field of speculation, to which the Circuit Judge objects, is certainly narrower under this method, than under the one he adopts of speculating as to results of a former year and then speculating again as

to the effect of the speculative results of that year upon the following year. By the method we maintain as the proper one there is but one step in the speculation, by the Court's method, a speculation is based upon a speculation.

Taking as a basis of calculation for the year 1901-2 the value of the plant at replacement cost fixed by the Special Master and the income and earnings of the plant and the per cent. of reduction by the city rates, *proved by the treasurer of this company,* without making any change or correction whatever in the figures, it will appear that the water company's income was entirely adequate to protect this ordinance against the charge of confiscation. The figures upon which this calculation should be made are as follows:

Value of plant March 30th, 1901, as fixed by the Special Master	$608,427.95
Entire income of plant for the year 1901-2 for actual water *collections only,* at the water company's rates, proved by the treasurer	95,452.12
Estimated income for the same year under the city ordinance rates *ascertained by the treasurer* by reduction of revenue derived from meters and fixtures, omitting hydrants, by 22.88 per cent	76,233.58
Entire operating expenses for the same year under the water company's rates without any reduction whatever, *as proved by the treasurer*	37,003.25

E. Wheeler, 716.

Deducting operating expenses, as proved by the treasurer from the revenue realized under the city's rates estimated by the treasurer at 76,233.58

Leaves a balance of .....$ 39,230.33

a sum sufficient to pay 6.448 per cent on the Special Master's estimate of the value of the plant, to-wit: $608,-427.95, and sufficient to pay 7.846 per cent. on the city council's valuation of the plant at the time of passing the ordinance to-wit, $500,000.00. This latter per cent is within .154 of one per cent of the full demand of two per cent. for depreciation and six per cent. for fair return as claimed by the water company and reported by the Master.

We have hereinbefore expressed our views of the Special Master's valuation of the plant and will not repeat them here. It is safe to affirm that it is questionable, to say the least of it, whether the city council's estimate of the value of this plant was not more reasonable under the facts of this record than that of the Special Master. Absolute certainty, of course, is not attainable on a question of this sort. The treasurer's aggregate of income, actually realized for this year, from operation of the plant at the water company's rates, to-wit: $95,452.12, is based on *actual collections for water only.* It does not correctly represent the *earnings* of the plant even from *water.* Undoubtedly this sum should be increased by the sum of $1,065.13, the difference between the *actual collections* and the *actual earnings* of the plant for water only

during the year, shown by the difference in amount of uncollected, but collectible water accounts, carried into and out of this year——the excess of those carried out at the end of the year over those carried in at the beginning of the year being the above sum of $1,065.13. This sum did not, as the Special Master supposed, consist of old and doubtful accounts but fresh accounts for the past month or quarter that fell due first of April, 1902.

F. C. Kimball, 906; 2216; 2229-32.
W. M. Nixon, 1385-87; 1811-12.

It is the *actual earnings,* that are collectible, not the *actual collections,* made within the year, that must be the basis for calculation, otherwise the water company could by manipulation of its books and collections defeat regulation altogether. Adding this sum of $1,065.13 to the treasurer's statement of actual *collections* for this year from water, at the water company's rates, gives as the *entire earnings* of this year $96,517.25 (an increase of over $8,000.00 over the income of the preceding year) which sum when reduced by 22.88 per cent. of receipts from meters and services (omitting hydrants which were not reduced by the ordinance) gives as the estimated *earnings* of the plant for this year at the city's rates, $77,055.42—a sum which, after deducting the entire operating expenses, leaves a balance of $40,052.17—a sum that will pay 6.583 per cent on the Special Master's valuation of the plant, to-wit: $608,427.95, and 8.01 per cent on the city council's valuation, to-wit: $500,000.00. This is the result upon in-

contestable figures proved by the officials of the water company. It is the claim of the water company that rates producing these results must be raised 50 per cent to make them adequate.

Wm. Wheeler 703-4.

"Taps" and "supplies" accounts or other sources of revenue than actual water earnings have been entirely eliminated from this calculation. No corrections of the Master's report as to value or of the treasurer's report as to income and operating expenses has been taken into consideration except to add the $1,065.13, a conceded item, to earnings. That the water company had other sources of revenue than water collections which its officials did not disclose, is rendered highly probable from their statements already quoted. The per cent of reduction of earnings by the city ordinance, to-wit: 22.88 per cent on the water collections from meters and services (omitting hydrants) though used in the above calculations, is excessive and not supported by evidence. The treasurer in arriving at this per cent acted upon a statement furnished him by some employee of the company whose name he could not remember and whose testimony is not taken in this case. The treasurer admits that he did not make the investigation and knew personally nothing of the facts or of the accuracy of the statement.

E. Wheeler, 713-14; 746-7.

Mr. Nixon, on the other hand, after making extensive

investigations of the matter personally, taking into consideration all the aspects of the question, fixes 18.5 per cent upon the *entire earnings* of the company, including hydrants, as the proper basis of reduction by the city ordinance. And his testimony as to this per cent is strongly corroborated by comparison of the two schedules of rates, the city's schedule making horizontal reductions of the company's rates in all but the large item of hydrants. It will appear that in most items the reduction was precisely 20 per cent. In a few items it was larger. But the large item of $11,455.00 derived from city hydrants was not reduced at all.

W. M. Nixon, 1397-8; 1829-30.

The difference between the per cents fixed by these witnesses is accounted for in part by the fact that Mr. Wheeler applies his per cent of 22.88 to receipts from meters and fixtures only, omitting hydrants which were not reduced, while Mr. Nixon applies his per cent of 18.5 to the entire earnings of the company including hydrants. The question in this case is not as to the effect of the city rates upon a part of the business of the company but as to its effect upon the whole revenue or income of the company. The difference of results in *dollars,* between the application of these per cents in the manner stated, is that the reduction under Mr. Wheeler's per cent of 22.88, applied to receipts from meters and fixtures only amounts to $19,462.13 and the reduction under Mr. Nixon's per cent, 18.5 on the entire earnings of the plant,

is $17,855.69, making a difference in favor of the city of $1,606.44 which should be added, if Mr. Nixon's view is correct, to the estimate of earnings under the city's rates, and this would increase the estimated earnings under the city's rates for the year to $78,661.00. As regards operating expenses fixed by the treasurer at the entire amount incurred in operating the plant at the city's rates, to-wit: $37,003.25—the amount used in the above calculations—there should be, as will appear at a glance, large reductions. One of the items included in the above amount reads:

"Water rates litigation, $1,156.34." The treasurer explains that this item is for "cost of litigation which has resulted from the passage of the ordinance."

E. Wheeler, 747-8.

This item should be rejected *in toto*. It is true there has been much litigation over this ordinance in all of which, that has been finally determined, the water company has been unsuccessful. Both the city and the water company have been put to great expense by this litigation. The city has been correct at all times and has been sustained by the courts in its view of its and the water company's rights under their contract. The water company has been wrong as determined by the courts uniformly. The water company, not the city, was to blame if the ordinance rates were not reasonable. They appear to have been reasonable from the facts that we

have recited. The questions at issue between the city and the water company were made and could and should have been settled in former litigation. The city has been held up, in the enforcement of its rates, for nearly seven years upon a bill some of whose averments are shown, to put it mildly, to have been utterly unfounded. The city has been put to vast expense by this litigation which it has paid or must pay. We submit that under these circumstances the city's water rates and its water consumers cannot be onerated with the water company's expenses of maintaining this sleeveless and injurious litigation. If this can be done for the purpose of defeating this ordinance, then the water company has the power by subsequent and sleeveless and vexatious litigation, had for the purpose of holding up the enforcement of the city ordinance, to render that ordinance invalid—a method of invalidating an ordinance so natural and easy that it will often be applied.

"Of course the items of expenses in the present action should be disallowed."

San Diego Water Co. vs. San Diego, 62 *Am. Rep.*, 275.

Mr. Nixon, the city's expert, examined this account and eliminated items that reduce it to $30,279.24.

W. M. Nixon, 1811-12; 1368-1372; 1736-58.

This account was made up pending this litigation. Without undertaking to defend all of the eliminations

made by Mr. Nixon, we shall merely state a few of them that unquestionably ought to be stricken out, to-wit: $88.25 for "Christmas remembrances;" $20.29 tax on real estate "outside city" and abandoned for use; $4.94 expended in entertaining a Mr. Payson; $10.00 contributed for flood sufferers; $30.00 paid William Wheeler for signing his brother's bond as treasurer; $30.00 paid Charles F. Parks (of Wheeler & Parks) for a like service. There are large items contained in this account for traveling expenses of the officials of the company on trips to various cities, some of which are in no manner explained, though the officials were on the stand after the items were challenged. Several items were eliminated as having resulted from ingenious book-keeping. Salaries of officials doing the engineering work on construction were paid and charged to this account and at the same time full engineering estimates are also placed in the construction account making up the value of the plant. It is safe to affirm that this operating expense account of the treasurer must be, upon any fair consideration of its items, largely reduced though the full amount has been used in our calculations. Upon this state of the record we submit that this case should be finally heard and dismissed without recommittal to a Master. The figures that show that the city's rates are reasonable, and even liberal, are few and proved in the main by the officials of this company. The enforcement of the city's rates, though entirely reasonable, has been arrested for nearly seven years, and during that period this water

company has been receiving an income from the water consumers of the city of Knoxville and environs which is clearly excessive to the amount of $20,000.00 to $25,000.-00 per annum. Even the circuit judge admitted that its rates were excessive. That the company will continue to receive an adequate income under the city's rates is shown by the *ex parte* report of the treasurer for the six months beginning March, 1902, and ending September 30th,1902. There had been a continued and decided increase in revenue during that period over the former year. This condition of affairs, inflicting irreparable injury upon the people of the city should not be permitted to continue in view of the fact that the city has been blameless in its conduct toward the water company and the water company has been arbitrary in its treatment of the city. It should not be forgotten that in one of its aspects, and a material one, the statements of the bill verified by the affidavit of the general manager to whom the actual facts must have been known, were utterly groundless. No attempt has been made to divide the plant or its income or operating expenses for this year between "city proper" and "outside city" as was done by the treasurer and the Special Master in dealing with the year 1900-01. We have assumed that it has been settled by this court that in cases of this character the plant and its income and operating expenses should be dealt with as an entirety. If any division was proper it should have been made as it was made in the Chattanooga case, to enforce the equities of the "city proper" against "out-

side city." In that case, in order to satisfy these equities, fifteen per cent of income was assigned to "outside city" and twenty per cent of operating expenses. The "city proper" has equities as against "outside city." By the city's consent and by that alone the water company could and did obtain its charter and existence. The "city proper" donated to the water company the use of its streets. The service and expense of delivering water to outside consumers is greater than that of delivering it to consumers living in the city and nearer the plant. If any division is made it should be a fair one, not such as was made for the year 1900-01, and for the purpose of meeting these equities. Such a division should not enure to the benefit of the water company or outside consumers though such division was made to perform that office in a very effective way in regard to the year 1900-01. It is by no means conceded that the water company is entitled to receive two per cent depreciation and six per cent fair return out of the net earnings of this plant in order to sustain this ordinance although we have demonstrated that it does receive those per cents upon a fair and conservative valuation of the plant. Two per cent for depreciation is the highest fixed by any witness in this case. The evidence shows that it ranges from one-half per cent to two per cent. The denial of any per cent for depreciation under some circumstances would not affect the validity of the ordinance, especially in a case like this where the items that should be covered and provided for by that per cent have been carried into operating expense account,

many of them at least, and actually paid out of earnings of the company. It would place a double burden upon the rates to allow this per cent after the items that it is intended to provide for, have been paid as operating expenses. In this case the taxes of this company amounting to about 2.65 per cent on the assessed value of the property were paid as operating expenses. Six per cent, with taxes paid, is about double what the ordinary investors are able to realize. The *wards* of the state upon whose funds six per cent only can be realized must pay taxes out of that amount. The water company is carrying, at this time, $411,000 of its bonded indebtedness at not exceeding five per cent. If six per cent is allowed it as fair return, it makes a net profit, in this transaction of, at least $4,110 per annum. Should not this profit enter into income account? This court has held in the Standford case that the mere denial of four per cent would not render an ordinance necessarily invalid. But in cases of this character the return to which the company is entitled is not to be determined by mere mathematical calculation of amounts or arbitrary per cents, though the city's rates are sufficient even on that basis, but is ascertained by looking to all the circumstances and the equities surrounding the case. A fair return may be, under differing circumstances, none or some or three or five or possibly a larger per cent. Under the circumstances of this case, wherein it appears that the city council acted fairly, conservatively and conscientiously in the performance of a public duty and one of great difficulty, and were deprived by the water company of the assistance to which they were

entitled in the performance of that duty, the court should not set aside their action of a legislative character upon slight grounds. Certainly it should not be done upon mere difference of opinion between the court and the legislative body as to the results reached. To establish a rule of interference on the part of the courts with legislative action in such case would render regulation of rates of public utility companies practically impossible.

Any statement of this case would be incomplete that failed to notice the water company's appeal for favor and sympathy, on account of the "hard conditions" that have compelled it to incur an indebtedness so greatly in excess of the cost and value of its plant and, especially, on account of the city's harsh treatment, in refusing to permit it to exceed its charter and contract limit, in mortgaging its plant.

It is averred, and the proof shows, that its indebtedness aggregated, on 31st March, 1901, the sum of $1,488,889.68—of which $830,000 was interest bearing, upon which it actually paid $48,127.78 interest for the year 1900-1. Mr. Kimball verified the averments of the bill by his oath.

Bill, Record 11-12.
E. Wheeler, 712.

The entire cost of the plant, wholly new, is estimated by the Special Master at $608,427.91; and by the water company's experts, Wingfield and Ludlow, at about $618,000.00; and by the city's experts, Nixon and Brown, at about $400,000.00; and by Wheeler and Kimball's "in-

vested value" statement at $711,000.00. The nature and excessiveness of most of these estimates has already been explained. The indebtedness of the water company therefore exceeded more than two to three times these estimates of cost of the plant when entirely new. The interest that the water company paid on this indebtedness for the year 1900-1901 was largely in excess of interest on any of these estimates of cost.

While it is true that the water company abandoned all claim to have its rates fixed with reference to its indebtedness, and while the Master concurred in that view, still the facts above recited, if true, are calculated to impress the Court with the notion that the water company's rates must be inadequate. We shall inquire therefore what caused this wide discrepancy between the cost or value of the water company's plant and its alleged indebtedness. It is inconceivable that the building and operation of this plant could have been an ill-advised and unfortunate venture. The city had 11,000 population when the plant was constructed in 1883-4. Its population had increased in 1901 to 35,000 or 40,000. The city is favorably situated for furnishing water cheaply. The water company at all times fixed its own rates with a free hand. The earnings of the plant for its first seven years of operation amounted to $209,000.00, though it is admitted by its present officers that the management during that period was wasteful and incompetent.

Wm. Wheeler 659; 692-3.
E. Wheeler 775-6
F. C. Kimball 2219-20.

Moreover it appears that two water plants in adjacent municipalities existing and operating under like conditions with this company during the same period were self-sustaining and profitable, although the municipalities had only about 2,000 population each.

Wm. Wheeler 473; 476; 483-4; 550.

But if the building and operation of this plant was an unfortunate business venture on the part of its promoters, then the water company, and not the public, must bear the loss. This is true both under the law and under the contract between the city and the water company. But the reasons for this company's alleged misfortunes are not obscure or far to seek. Its charter was obtained in 1882 by a band of promoters and exploiters to whom the Special Master allows in his estimate of the replacement cost of the plant $10,000.00 for services. The city donated to this company the plans for the plant and the use of its streets. By the contract between the city and the water company for the construction and operation of this plant as well as by the water company's charter, its power to mortgage the plant was limited for five years to $125,000.00 and thereafter to the additional sum of $25,000.00. The water company fixed its capital stock at $200,000.00—not one dollar of which was ever paid into the treasury of the company. It mortgaged its plant promptly, to the full limit of its power, to secure a bond issue of $125,000.00—a sum entirely adequate to build the plant required by the contract. The usual artifice was resorted to in order to

get the stock into the hands of the original promoters and exploiters, without their paying anything for it. This desirable end could not be accomplished by a direct proceeding, for the charter of this company provided that "the amounts of any unpaid stock due from a subscriber to the corporation shall be a fund for the payment of any debts due from the corporation" etc. Hence it was necessary that the stock should issue, in the first instance, to some irresponsible party as "paid up and non-assessable." Hence a so-called contract between the water company and one F. M. Lowry was made whereby Lowry contracted to construct the plant and receive therefor $200,000.00 of paid up non-assessable stock and the $125,000.00 of bonds. Mr. Lowry was a charter member of the company and at the time of this contract must have been the sole subscriber to the original stock of the company. He therefore made the contract with himself.

E. Wheeler 728-9.
Wm. Wheeler 602-606.

By this contract Mr. Lowry was required "forthwith" to sell the stock and bonds for enough to build the plant, to purchasers approved by one or more of the promoters and exploiters, and upon such sale the money was to be paid into the Mechanics National Bank subject to the joint check of Lowry and the water company. Only $47,170.00 was ever so deposited in bank and a considerable part of that was drawn out for other than construction purposes.

E. G. Oates 1237-1245.

The plant was constructed, not by Lowry under this contract, but by the water company itself—Lowry being employed and paid a weekly salary for his work amounting in all to $3,668.00

W. M. Nixon 1319.

The amount of the $125,000.00 original bond issue was ample to build the original plant and was all and probably more than all that was ever paid into the original construction. The "invested value" statement of Wheeler and Kimball, with all its gross over-estimates, puts the cost of original construction in 1883-1884 at less than $128,000.00. This includes reservoir at $33,000.00, more than twice its actual cost; cast iron pipe at $42.00 per ton; and engineering at about $6,000.00, when plans were donated by the city and only $1,856.00 was actually paid for engineering.

W. M. Nixon 1760.

Mr. Nixon makes a careful estimate of the original cost of construction at from $110,000.00 to $112,000.00.

W. M. Nixon 1450; 1527; 1530; 1802-04.

So it is clear that the bond issue of $125,000.00 was ample to construct the original plant. The capital stock alone would have afforded, if paid in, nearly double the amount required for original construction. It is clear,

therefore, that there was no necessity to bond the plant, and that nothing whatever was paid into the treasury of the company for the original stock. The original promoters and exploiters of this plant and company, possibly with some unimportant changes, retained the ownership and control of the plant and its operations until December 1890. Mr. Wheeler says these owners "were not waterworks people," and were inexperienced in the business and admits that the management had been bad and wasteful.

Wm. Wheeler 659; 692-3.

During the period from 1884 to December 1890, these promoters and exploiters increased the indebtedness of the water company by the following sums, to-wit:

Additional issue of first mortgage bonds .....
.....$25,000.00
Issue of 6 per cent debenture bonds ...$85,000.00
Additional issue of stock $50,000.00

As shown by the company's books, nothing was paid into the treasury for this additional issue of stock. It further appears that only $23,750.00 was paid in on the $25,000.00 issue of additional first mortgage bonds, and the full amount on the debentures was not paid in. The books show much scratching and erasures.

W. M. Nixon 1379.

There had therefore been created up to December 1890 a total indebtedness of $485,000.00. Under the

"invested value" estimate of Wheeler and Kimball, a grossly exaggerated estimate, there had entered into the construction of this plant up to December 1891, a year later than the above estimate of indebtedness, only $221,000.00 or $222,000.00. According to Mr. Nixon's estimate there had entered into the construction of this plant at the above date only $150,000.00 to $155,000.00.

W. M. Nixon 1450; 1802; 1808.

There was therefore between $263,000.00 and $330,000.00 of *water* at this date in the indebtedness of this company—a sum in excess of the entire capital stock at that date. In December 1890 Wheeler & Parks, a firm owning, operating and exploiting water-works in a dozen or more cities, purchased, at fifty cents on the dollar, a majority and controlling interest in the original stock of the water company, paying therefor to the former owners over $100,000.00.

Wm. Wheeler 540-41; 455-56.

This transaction was not as the court and Special Master assumed, one between an "old" and a "new" company, for there was no change of company, but only of majority control of its stock. The city dealt, at all times, with the corporation, the water company, not with the majority control of its stockholders, at any particular date, and the corporation is responsible for mismanagement of the corporation, alike, whether it occurred

under one or another management. It was a transaction wholly between the *stockholders* of the water company. Not one dollar of this amount ever went into the treasury of the water company. Every dollar of it went into the pockets of the former stockholders who had mismanaged and manipulated the business of this company and who had not paid anything for their stock. It was the price paid by Wheeler & Parks, not so much for any value in the plant itself, as for the opportunity that they supposed to exist of exploiting an inviting field of operation and fleecing what appeared to be a helpless and submissive victim. The series of transactions that followed the advent of these new owners and exploiters of the water company and its plant affords additional and convincing evidence that they were (unlike their predecessors,) "water-works people." Evidence is not wanting of their *ability* and *ingenuity*. Evidence is wholly wanting to show any sense or recognition of duty or obligation on their part to the public. The first act of this new management was an effort, made in the spring of 1891, to have the city pass an ordinance releasing the charter and contract limit on the power of the company to mortgage its plant. The mayor's veto defeated this measure. It is not disclosed in this record what was the *cost* to the water company of its effort to secure the passage of this ordinance. The date of this action precedes the date of the first item on the "franchise account." About the same date, to-wit, in April, 1891, Wheeler & Parks, the purchasers and owners of the Knoxville Water Company made a contract,

with the adjacent municipality of North Knoxville, to erect for that town a water plant. Having constructed this plant in part only, Wheeler & Parks by an arrangement made between themselves and with themselves as the owners of both plants, without the knowledge or consent of the city of Knoxville, turned over the North Knoxville plant to the Knoxville Water Company to be run for its revenue, less hydrant rental, during the initial years.

Wm. Wheeler 463-468; 473-478; 487-488;444-45; 708.
F.C. Kimball 805-6; 872; 877.

If the water company could without loss operate this incomplete plant in its initial years for its revenues, less hydrant rental, in a town of 2,000 inhabitants, its business in a city of 35,000 to 40,000, with large hydrant rental, must be enormously profitable.

This arrangement, it is clear, could not have resulted otherwise than in loss to the Knoxville Water Company and in adding additional burdens to the rates of the city's consumers. It was continued between one and two years.

In 1893 Wheeler & Parks, owners and exploiters of the Knoxville Water Company made a second effort to secure the passage of an ordinance releasing its bond limit. This effort was likewise defeated by the mayor's veto.

Bill, Record 11.
Wm. Wheeler 481-2; 489.

This effort seems, from entries made on the "fran-

chise account," which neither the president nor the treasurer are able to explain, to have been rather expensive to the water company. The first item on the franchise account (improperly dated 1898) and perhaps the second one, represents the probable amount of this expense. This "franchise account" will be reviewed later. Having failed in their second effort to secure from the city the release of their charter and contract bond limit upon the power to mortgage the plant, the water company resorted to another expedient. Possibly the reason for the mayor's refusal was some notion that the stockholders of the water company should pay, at least *something* upon their stock and the full amount of the proceeds of bond sales, into the treasury of the company. Soon after this last effort the water company increased its capital stock to $1,250,000.00—$500,000.00 of which was declared to be preferred stock

Wm. Wheeler 454.

At this date, Sept. 6, 1893, Wheeler & Parks voted 2417 out 2435 shares of the water company's stock.

Wm. Wheeler 591.

The necessity for funds, so strongly stressed at this meeting was created by the requirements of theWheeler & Parks contract with North Knoxville, which they contemplated then unloading upon the city company.

And thereupon Wheeler & Parks, as the Knoxville Water Company, made a contract with Wheeler & Parks,

owners of the North Knoxville plant, whereby Wheeler & Parks conveyed to themselves under the name of the Knoxville Water Company, their North Knoxville plant. The Knoxville Water Company was required to assume and did assume by the terms of this contract all of the obligations that Wheeler & Parks had entered into with the town of North Knoxville. This contract was likewise made without the knowledge or consent of the city of Knoxville.

Among other things the contract of Wheeler & Parks with North Knoxville required filtered water, high service and some other things that the city of Knoxville was not in a condition to perform without large expenditure for extensions, additions or improvements of its plant. It was necessary for the water company to make these additions and improvements and they were made *primarily* for the purpose of performing Wheeler & Park's obligations with reference to the North Knoxville plant. This is admitted by Mr. Wheeler and Mr. Kimball.

F. C. Kimball 805-6; 872; 877.
Wm. Wheeler 463; 468; 473; 478; 487-8; 708; 444-5.

A large amount was expended by the water company *primarily* for the purpose of meeting these obligations of Wheeler & Parks to North Knoxville which had been thrust and unloaded upon the water plant of the city without the city's knowledge or consent. This necessarily resulted in unduly burdening, undoubtedly to some extent, the rates of city consumers. At the same time Wheeler

& Parks, owners and in absolute control of the Knoxville Water Company, made another contract with themselves by which they were to do a very large amount of construction for the water company. The prices fixed for such construction were very excessive in the first place and Wheeler & Parks were to be paid at the rate of $1.00 in preferred stock with an additional $1.00 in common stock, for every dollar's worth of construction done at these excessive prices. This was the contract of November 17th, 1893, or about that date.

All the preferred stock and all of the common stock, ever issued (except the $250,000.00 of original common stock) was issued to Wheeler & Parks under this contract.

E. Wheeler 739-40.
Wm. Wheeler 456-7; 459.

Under this contract there was issued to Wheeler & Parks about $295,000.00 of preferred stock and about $390,000.00 of common stock for construction work, estimated by Wheeler and Kimball in their "invested value" statement at about $164,977.91 after eliminating such items as were paid for in cash, and the cost of the North Knoxville plant, from which it appears that the amount of preferred and common stock exceeded the estimated cost of construction at grossly excessive prices by more than $500,000.00, and the issue of preferred stock alone exceeded the estimated cost of construction by more than $100,000.00.

W. M. Nixon 1343-4; 1377; 1379; 1476-77; 1800-01; 1819.
E. Wheeler 739-40.
Wm. Wheeler 456-7; 459.

The effect of this transaction was to increase the nominal indebtedness of this company by more than $500,000.00 for which no consideration whatever accrued to the company.

Mr. Wm. Wheeler returned to the witness stand and was examined touching "going concern" and other matters after this transaction had been laid bare by the testimony of Mr. Nixon and did not undertake to justify or even explain this matter. What is more remarkable Mr. Kimball did the same thing.

In view of the above facts, the strenuous and persistent objections of the water company to the production of the books of Wheeler & Parks, for use on the cross-examination of William Wheeler and F. C. Kimball, with reference to the prices and quantities used in their statement of "invested value" can be understood. The books of the water company contain no items or quantities or prices of material and labor actually paid and used in the construction of the North Knoxville plant, and the extensive additions made to the plant of the Knoxville Water Company by Wheeler & Parks under the contract of November 17th 1893. The only information afforded by the water company's books, was a lumping statement of amounts paid in stock or cash to Wheeler & Parks, the so-called contractors, for construction work done under the contract. The books of Wheeler & Parks, who were in fact the Knoxville Water Company, did show the items indicating actual quantities and prices of materials in said construction. These books were in the same build-

ing in which Wheeler and Kimball made up their so-called "invested value" statement. They declined to look to these books for actual prices and quantities, and instead estimated upon their general experience, the prices and quantities used in making up this estimate. These Wheeler & Parks books were at the time, in the possession and under the control of William Wheeler. It is admitted by Mr. Wheeler that the prices used by himself and Mr. Kimball, in making up their "invested value" statement were not the prices actually paid.

On the cross-examination of Mr. Wheeler and for the purpose of testing the accuracy of the prices and quantities upon which he based his estimate, these Wheeler and Parks books were called for, and their production refused repeatedly. Mr. Wheeler even refused to look at the books when asked to do so, and ascertain the actual prices which the city claimed were much less than the estimated prices.

The city appealed to the Special Master and to the court to compel the witness to produce these books for inspection, and to be used in the cross-examination of Wm. Wheeler and F. C. Kimball in reference to their "invested value" statement. The witness was examined at Knoxville, and within the jurisdiction of the court. Both the court and the Special Master refused to compel the production of these books for these purposes.

William Wheeler 470-473; 503-4; 572; 589; 608; 625-7; 708-9
F. C. Kimball 2219.
E. Wheeler 728-9.

See also the proceedings consisting of petitions to the court and Special Master and opinions rendered thereon, Record 128-141; 168-276.

We insist the action of the court and Special Master in this regard was erroneous, and have cited the cases in the petitions that were filed.

In 1895, the water company, under its new management took under consideration the re-adjustment of its schedule of rates, and in some way disarmed opposition by the city council, to a schedule of rates dictated by itself, and which of course, was reasonably high.

Bill Record, 6-7; 51-2.
William Wheeler 446-7.

It may be noted as a singular coincidence that items aggregating nearly $10,000.00 contemporaneous with the above action of the city council, are found entered in that mysterious account, known in the record as "franchise account."

Elbert Wheeler 777.

William Wheeler's attempted explanation of these entries upon the "franchise account" is hardly to be deemed satisfactory, since this transaction was not conducted by himself, but by his attorney, as indicated by the entries upon the "franchise account," and besides, Mr. Wheeler's memory about these franchise matters, cannot be wholly trusted, as both he and

his brother, the treasurer, are utterly unable to give the slightest explanation of the large item of $4,741.87, entered on said account as having been expended by himself on account of litigation. This item is dated, by mistake, 1898, (which should be 1893.)

E. Wheeler 777, 786; *William Wheeler* 2179-80.

It would be interesting to know the purpose for which this sum of $4741.87 of the water company's funds was expended, but unfortunately neither the president nor the treasurer of the company, is able to give the slightest clue.

Another transaction: In 1892-3, the Lonsdale Beaumont Water Company erected a water plant in the small town of West Knoxville under a contract with that municipality for its erection and operation. West Knoxville adjoined the city of Knoxville, and in 1897 the two municipalities were consolidated. This L-B plant was a competing one with the Knoxville Water Company.

H. P. Coile 1297-8.
William Wheeler 696; 2173.
E. Wheeler, 794.
F. C. Kimball 1270.

This competition was a menace to the water company's rates. The water company had competed with the L-B Company for the contract to build and operate the plant in West Knoxville. In 1899-1900 the water company made its third effort, which was successful, to get

the city council to release the limit upon its power to mortgage its plant, prescribed by its charter and by its contract with the city, and at the same time to rid itself of the competition of the L-B plant, and to obtain the city's consent to this transaction. Accordingly an arrangement was made in 1899 by the treasurer of the water company for the purchase of the stock and bonds of the L-B company at the price of about $120,000.00

E. Wheeler 791-3.

This purchase was made with the distinct purpose of wrecking the L- B plant.

William Wheeler 542-546; 581-2; 2156-7.

Accordingly soon after its acquisition, portions of the L-B plant worth more than $54,000.00 were wrecked and put out of business of furnishing water to the public. This wrecking was done at considerable expense to the water company, as indicated by the fact that the operating expenses of the company for the year 1900-1, exceeded those of the previous year by more than $4200.00. This purchase and wrecking of the L-B plant was for the sole benefit of the water company. It was antagonistic to the interests of the city and its water consumers. Furthermore, it was done in violation of the statutes of the State. A water company may, under the statutes of Tennessee, purchase or otherwise acquire "the property and working franchise of another water company, when

the two companies are not being operated and run in competition with each other."

Shannon's Code, Sec. 2506.

The consent of the city to the acquisition of the L-B plant by the water company does not validate the transaction.

New Albany Water Works vs. Louisville Banking Co.
122 *Fed. Rep.* 777.

The act, both as to the city and as to the water company is *ultra vires* and void.

Contemporaneous with these transactions, there was added to the "franchise account" several thousand dollars, and it appears in the proof that the treasurer of the company, who was upon a salary, received $4,600.00, and the attorney of the company likewise upon a salary, received $7,000.00 for extra services in effecting this transaction. These accounts seem to be additional to those entered upon the "franchise account."

E. Wheeler 777; 791-3.

We submit that it is not just or lawful to burden the rates of the city's water consumers with any part of the indebtedness, or alleged indebtedness, created by this illegal transaction, made for the sole interest of the water company, and in antagonism to the interests of the city and its water consumers. The water company,

at last successful, on the third effort in securing the release of this bond proceeded to bond its plant for $1,000,000.00. It would be interesting to see the prospectus put forth to induce purchasers to invest in these bonds. It succeeding in floating $411,000 of these bonds at 4½ per cent interest. It complains that the sale of the remainder was prevented by the city's action in asking to know something about the reasonableness of the rates its water consumers have been paying for about 17 years. Is it not more probable that investors were unwilling to take $1,000,000 issue of bonds secured by a plant whose value did not exceed $500,000?

The "franchise account" already adverted to, will serve, in a measure, to explain the large discrepancy between the indebtedness of this company, and the cost or value of its plant. This matter can be best explained in the language of the treasurer, which we quote:

Q. "To what extent does this franchise item enter into your accounts, General Wheeler?

A. "It is as follows:

June 1, 1898 (1893), Wheeler & Parks, expenses at Nashville and Knoxville acc't of litigation, etc. $4741.87

Apr. 9th, 1894, legal account $2575.00

Feb. 28th, 1895, William Wheeler, services and expenses, various legal matters ..... $ 178.11

Mch. 31st, 1895, legal account $3092.75

Dec. 26th, 1895, C. T. Cates, legal acc't..$ 700.00

Feb. 10th, 1896, William Wheeler, telegrams from February to April 30th..$ 10.88

Mch. 23d, 1897, C.T. Cates, extra services in 1895 (paid with 50 shares of stock).$5000.00

Feb. 28th, 1899, "franchise account"..$1385.00

Apr. 5th, 1899, expenses to Nashville to look after question of privilege taxes.$ 25.25

Apr. 28, 1899, International Trust Co. ..$ 725.00

Oct. 24th, 1899, Elliott National Bank...$3015.00

Jan. 30th, 1900, International Trust Co..$ 535.00

Apr. 5th, 1900, C. T. Cates, expenses to Knoxville to look after sundries.....$ 26.75

Mch. 31st,1900, certified copy of consolidation ordinance .....$ 1.20"

E. Wheeler 776-7.

This account terminates March 31, 1900, one year prior to the date of the passage of the ordinance, though similar items subsequent to this date are shown in the proof.

The treasurer further testifies as follows:

"Q. General Wheeler, you have handed me this morning a paper, denominated franchise account, which is produced in answer to a former question propounded to you on this cross-examination. Is this franchise account kept on your

books as a separate account, or is this statement made up from items gathered from an inspection of other accounts?

A. It is kept as a separate account during the period indicated by the account, but not before nor since, and the account is a transcript of the entries in my books.

Q. Now what book and at what page will this account be found, General?

A. Ledger, page 254.

Q. This account runs from June 1st, 1893, to March 31st, 1900, and aggregates about $22,000.00, beginning with the item June 1st, 1893, purporting to have been made to Wheeler & Parks for expenses at Nashville and Knoxville, account litigation, etc., $4,741.87. What are the items that make up this account, General?

A. I have no itemized statement of it. I entered in this account all the records that my books showed of the matter.

Q. Is there no voucher in your possession showing what this lien (item) is for?

A. Undoubtedly there is a voucher, but the copy furnished was taken from the books herewith presented, and is undoubtedly word for word a copy of the item on the voucher, in full detail.

Q. Was there a statement rendered of the particular items of service and expense?

A. No sir, not beyond what is shown on the statement itself.

Q. Do you know what the litigation and other matters were by which this item was incurred?

A. I do not remember, but I suppose the larger part of it was extra legal expenses paid our counsel by Wheeler & Parks, and by them charged to the company, but I do not recall and cannot state what circumstances may have caused settlement with our counsel to have been made by Wheeler & Parks instead of myself directly.

Q. To whom was this amount paid?

A. Wheeler & Parks.

Q. You had, at the time, regular counsel employed by the company on a salary, hadn't you?

A. We had, but always with the understanding that such regular salary covered ordinary legal advice and service for the benefit of the superintendent locally and for ourselves—extraordinary services were not considered to be covered by the annual retainer or salary.

Q. Did you have any litigation at Nashville at any time?

A. Not that I know of sir, I don't recall any.

Q. Your regularly retained counsel was employed to attend to all litigation you had at Knoxville, wasn't he?

A. He was employed to attend to it wherever it occurred.

Q. The next item, "April 9th, 1894, legal account $2,575.00," to whom was this paid?

A. To Mr. Cates probably.

Q. This is in addition to his regular salary?

A. Yes, sir.

Q. Was there an itemized account rendered to you for the services?

A. No sir.

Q. On account of what services was that paid?

A. I do not know; we have never been in the habit of requiring counsel, either in this company or any other with which I have had to do, to render itemized bills of account, assuming that attorneys of good and regular standing will render no accounts which are not proper, and I think that this practice is usual. It certainly is, so far as my observation has gone.

Q. You paid the account without knowing what it was for, did you?

A. Yes sir, in detail.

Q. You asked no explanation?

A. No sir.

Q. How was it paid, by draft upon you from time to time?

A. I cannot say, sir; probably in the single amount, as the entry so indicates.

Q. The next item is, "Feb. 28th, 1895," an item paid "William Wheeler, services and expenses various legal matters,..$178.11." Can you furnish any itemized statement of this amount?

A. No sir, nothing beyond what is indicated by the account itself.

Q. Was there any rendered to you?

A. No sir.

Q. Do you know what the services or expenses were?

A. I do not. We think we have rightly grounds for concluding that no improper charges will be made.

Q. The next item is "March 31st, 1895, legal account..$3092.75." To whom was that paid?

A. Probably to Mr. Cates.

Q. Was that in addition to his regular salary?

A. Yes sir.

Q. Was any itemized statement of this account rendered to you?

A. There was not.

Q. Do you have any idea what the services were?

A. I have not.

Q. You made no inquiry, but paid it without inquiry?

A. So far as I recollect, I did.

Q. The next item is "Dec. 26th, 1895,C. T. Cates, legal account..$700.00. Is the same true of this item as the last one inquired about?

A. It is.

Q. The next item "Feb. 10th, 1896, William Wheeler, telegrams from Feb. to April 30th, $10.88." Do you know what those telegrams were about?

A. I do not.

Q. The next item "Mch. 23d, 1897, C. T. Cates, extra services in 1895..$5,000.00. (Paid with 50 shares of stock.)" Is this item explained in the same way as the preceding items, paid to Mr. Cates?

A. It is, with the further notation made in the account that it was paid in fifty shares of stock—that is, common stock of the company. It was paid in common stock instead of cash.

Has that stock been redeemed?

A. No sir.

Q. Was it guaranteed?

A. I do not know. What do you mean by guaranteed? It was the usual and ordinary stock of the company.

Q. The next item Feb. 28th, 1899. "Franchise account, $1385.00." To whom was that paid?

A. Undoubtedly to Mr. Cates.

Q. Is that explained in the same way as the preceding items that were paid to Mr. Cates?

A. I think it is.

Q. The next item "Apr. 15th, 1899. Expense to Nashville to look after question of privilege taxes, $25.25." What question about privilege taxes had you at Nashville?

A. I am not speaking with positiveness but I think I raised the question whether or not the water company having a right to do business in Knoxville by its charter, could properly be assessed by the city for the privilege of doing business, but as I stated, I have no definite recollection as to the immediate necessity for that expenditure.

Q. You had no litigation there about the matter, did you?

A. No sir.

Q. The next item is "Apr. 28th, 1899, International Trust Company, $725.00," to whom was that paid?

A. That was probably a draft in favor of Mr. Cates.

Q. Is it explained in the same way as the other items paid to Mr. Cates?

A. It is.

Q. The next item is "Oct. 24th, 1899, Elliott National Bank, $3015.00." To whom was that paid?

A. Probably a draft to Mr. Cates, with the same explanation.

Q. The next item is "Jan. 30th, 1900, International Trust Company, $535.00," to whom was that paid?

A. Undoubtedly it is a draft in favor of Mr. Cates, with the same explanation.

Q. The next item is "Apr. 5th, 1900, C. T. Cates, expenses to Knoxville to look after sundries, $26.25." What was that about, General?

A. I don't recollect sir.

Q. Mr. Cates lived at Knoxville, didn't he?

A. He does, but the entry on the books reads thus, and therefore the transscript was made. Whether or not it is a clerical error, I don't know.

Q. Now, you have not given this "franchise account" except one small item—I mean subsequent to April 5th, 1900. I will ask you to continue it down to date, September 30th, 1902?

A. I have already testified that the account ceased with the item of March 31st, 1900, which item was for certified copy of consolidation ordinance, $1.20."

Other items of a like character with those found on this "franchise account" are found scattered through this record, notably one for $500.00 and another for $300.00, and the sum paid the water company's treasurer and attorney, aggregating $11,600 on the L. B. purchase.

F. C. Kimball, 2129, 2224-5, 2227.
W. M. Nixon, 1365; *E. Wheeler* 772.

Upon the recall of Mr. William Wheeler, who had stated on his first examination that he did not remember of any amounts that had been paid on "franchise," he was asked on cross examination to explain this item of $4,741.87 shown on the "franchise account," which had then been introduced by the treasurer, and he was unable to state on what account a single dollar of that item was expended.

William Wheeler, 2179-80.

When the books of the water company were submitted to the examination of the city's expert, W. M. Nixon, it appeared that the original explanation of most of the items of this franchise account had been scratched and completely erased and over that erasure written the explanation appearing in the account, as presented by the treasurer.

W. M. Nixon, 1310-11.

The original explanations had been so completely erased that they were illegible even with the aid of a

glass. This book came from the possession of the treasurer, and these erasures are not denied or explained. It is a significant fact that in an entry dated March 23rd, 1899, showing payment of a fee to Webb & McClung, attorneys, a full explanation of the service rendered appears upon the book, and without erasure. No official of the water company could remember any litigation or other services for which these sums could have been paid to Wheeler & Parks and the attorney of the company in addition to regular salary.

The Special Master reports this indebtedness without comment. He reports further that since 1891 the water company "has had exceptionally intelligent and experienced managers" and had been "represented by parties of great experience," who thought that earnings or income would not be increased by reduction of rates or they would have reduced them "without this expensive litigation."

Report, Record, 167, 181.

The experience of the management of the water company, especially since 1891, is conceded. It would seem, however, that officials of such ability and experience as those having charge of its affairs since 1891, should not have paid such large sums as those appearing in "franchise account" without knowing what benefit was to result to the company from the expenditure.

Misconduct in the management of the water company's affairs, it must be conceded, was not the result of ignorance or mistake.

The methods of this company, while they would not perhaps have the effect of repelling it entirely from a court of conscience, have nevertheless, placed its financial and other affairs in a condition of confusion, from which it is impossible to determine, with any degree of accuracy, any one of the material questions that must be ascertained to enable the court to determine the question of the reasonableness of the city's rates.

Another matter that contributed to increase the discrepancy between this company's indebtedness and the value of its plant is its excessive and unnecessary expenditure for interest and discounts.

In the first seven or eight years of its existence, it is admitted, as shown by its books, that it paid on interest $715,349.30 interest, although it had expended upon its plant, little if anything in excess of its $200,000 of capital stock. There was no necessity for the payment of one dollar of interest if its capital stock had been paid in.

F. C. Kimball, 2234-5, 2237.

At the date of filing its bill it was paying interest on $830,000 of indebtedness, with a plant estimated by the Special Master as costing when new, only about $608,000, and actually worth much less.

During the period from 1883 to 1891 the plant yielded an income of about $209,000, upon an investment of not over $150,000 to $175,000 on an average.

(4)

Re-Statement and Recapitulation of Errors Assigned.

FIRST.

The Court erred in sustaining the bill and declaring the city ordinance of 30th of March, 1901, unconstitutional and void upon any of the grounds urged against its validity. The Court should have sustained the ordinance and dismissed the bill, without any reference to the Master as to the reasonableness of the city's rates, and should have done so likewise upon consideration and correction of the Master's report.

Assignment of Errors, Record 312-313.

This Court has determined in another case that the city council had power and authority under the law, which had not been impaired by any contract with the water company, to pass an ordinance regulating in a reasonable manner the rates of the water company.

Ante pages 9-11.

By the findings of the Special Master, approved by the Circuit Judge, the city council proceeded in the passage of its said ordinance in a fair and conservative manner after due notice to and hearing of the water company and after diligent investigation. This finding is not excepted to or complained of by the water company.

Ante pages 11-40.

By like finding of the Special Master approved by the Circuit Judge and not excepted to or complained of by the water comapny, it appears that the water company refused, upon request of the city while engaged in investigation looking to the passage of said ordinance, to furnish to the city council information as to the value of its plant , the amount of its income and of other material matters. This refusal on the part of the water company was arbitrary and unreasonable.

Ante pages 30-31.

It further appears that material averments of the bill in this case upon which the extraordinary process of injunction was sought and obtained are untrue and must have been known to be untrue by the official making affidavit to the bill. This places the water company in the attitude of abusing the extraordinary process of the court and thereby obtaining an advantage over its advisary.

Ante pages 22-31.

Other than the averments that the city failed to give notice and hearing to the water company and to make investigation before the passage of the ordinance—averments that are found by the Special Master and the Circuit Judge to be untrue, there is no averment in the bill, original or amended, supported by a scintilla of evidence that the city council acted otherwise than fairly and in good faith—certainly none that imputes to it

fraud or bad faith of any kind. The finding of the Court and Special Master is to the contrary and not excepted to. There is no averment or charge in the original bill and no direct or positive charge in the amended bill that the water company had not received an income subsequent to the passage of said ordinance sufficient, when reduced to the level of the city's rates, to have afforded it a fair return upon the value of the plant. It appears that the City Council estimated value of plant at $500,000 —midway between the estimates of the water company's and the city's experts of replacement cost, and it estimated the income at $75,000 to $80,000, when the treasurer of the water company admits an income of $95,452.12, for the first year after the passage of the ordinance, and the evidence shows it in excess of that amount. Upon this state of the record the bill should have been dismissed without any reference at all as to the reasonableness of the rates, and the same result should have followed upon consideration of the Special Master's report, even without correction of any of the numerous errors of law, by which the Special Master reached the conclusion that the income of the company reduced to the level of the city's rates was sufficient for the *year preceding* the date of the passage of the ordinance to pay, (after deducting operating expenses and 2 per cent for depreciation,) 3.35 per cent on the value of the plant fixed by him upon the basis of the cost of replacement. This was the result reached by the Special Master after reducing the revenue to the basis of the city rates and dividing the value of the plant

as well as its income and operating expenses most inequitably between "city proper" and "outside city" and reducing the revenue under the water company's rates by an excessive per cent of 22.88 so as to bring it to the level of the city's rates. The Special Master's report by which he reaches said result is open to many other just exceptions, but even upon the result as shown by that erroneous report, there is no sufficient evidence to impeach as confiscatory the rates fixed by the city council in good faith by proper proceedings without the necessary assistance demanded of the water company, whose arbitrary and unreasonable refusal must have brought about the mistake in fixing rates, if any was committed. There is nothing in the results reached by the Special Master to convict the city council of fraud or any sort of misconduct in the fixing of the rates. This is not a mere review of the case as on appeal. It is not a question whether the court upon this hearing would decide the question differently from the decision reached by the city council upon its investigation. Legislative action will not be set aside upon any such ground. But we have shown in a former part of this brief, and will further point out in the course of these assignments of error, that the result reached by the Special Master was wholly erroneous. He applied the income and operating expenses of the wrong year to the value of the plant and committed very gross errors, even in doing that.

Upon another but more technical ground this case should have been dismissed. It was heard without proof

upon the bill and answer—the answer having denied all the material averments of the bill. Upon this state of the record there should have been a dismissal.

Ante pages 48,49.

Moreover it is doubtful whether the bill even after its amendment contained allegations sufficiently specific and positive to sustain it against the demurrer.

SECOND.

The Court erred in making any reference of the cause to the Master. He likewise erred in the method and manner of making the reference and in the matters referred, and in giving erroneous directions, and in failing to give full and proper directions to the Special Master for executing the reference, thus inducing serious errors and much confusion on the part of the Special Master to the prejudice of the city.

Assignment of Errors 312-313.

For reasons stated in the first assignment of error, no reference at all should have been made, but if a reference was proper the Court erred in ordering it without and before hearing the cause and settling controverted questions between the parties as to the points of reference and in failing to settle the principles that should have guided the Special Master in executing the reference.

Ante pages 48-60.

It was a palpable error for the Court to refer to the Special Master without consent of parties, the law as well as the facts of the case, conferring upon the Special Master autocratic power to settle the law. There was no consent on the part of the city to this order of reference and to this abdication by the Court of his functions as a judge and thus conferring the same upon the Special Master. This case was one of extreme difficulty, especially as regards matter of law, and it was highly improper to have referred the law of the case to a Special Master who was not himself a lawyer.

Ante pages 48-60.

The particulars in which this action of the Court proved prejudicial and injurious to the city will be pointed out in other assignments of error.

THIRD.

The Court erred in its rulings and decisions in reference to the valuation of the water company's plant, especially in the following particulars, to-wit:

(a)

The Court erred in adopting the Special Master's basis of value of the existing plant at the replacement cost of a new and similiar plant. The existing plant had

been long in use and had been much depreciated in value.

Ante pages 62-75; 127-138.
Assignment of Errors, Record 314.
Report, Record 168; 175.
Opinion 305.

While the Court did not specifically approve the action of the Special Master in every particular, still he adopted the result reached by the Special Master. Replacement cost is not value but mere evidence of value, depending for its weight or significance upon many circumstances, e. g., whether the prices used in making it up are high or low or normal; or whether it contains more or less or different things from those used in the original construction; or whether the replaced plant is new or old and deteriorated, etc. The Special Master admits that he, in many instances, used prices that were high in his estimate of replacement cost of the new plant which he treated as value of the existing plant. He also reports that he included in the plant some things that were not in the original plant and other things that were donated by the city to the water company, and still others that were donated by the water consumers themselves.

Ante pages 62-75.

(b)

The Court erred in estimating, or confirming the action of the Special Master in estimating, as part of

and contributing to the value of the plant, as a basis for fixing rates, such things as service connections, amounting to over $30,000.00, that were put in by the consumers or at their cost and expense; and "going concern" estimated at $60,000.00, which was contributed by the city in hydrant rental and by the patronage of the water consumers and paid for annually as an operating expense; and restoring brick pavings, none or little of which entered into the construction of the original plant or was of any cost or expense to the water company or of any benefit to its plant.

Ante pages 127-138.
Opinion 300.
Petition to rehear 209.
Report 179-180.
Exceptions 156-7.
See 62 *F. R.* 866; 22 *F. R.* 921.

(c)

The Court erred in refusing to consider, and in sustaining the Special Master's refusal to consider, as affecting the value of the water company's plant serious defects shown to have existed in the same, such as insufficient size of pipe, failure of plant to afford fire protection, etc. The reasons for this refusal are stated in Report, Record 176-7; Opinion, Record 298; and the reasons for the contrary view are stated in the city's petition to rehear.

Record 208.

Certainly age, condition as to use and wear, suitableness and sufficiency etc. of the plant must and ought to be taken into consideration in ascertaining its value for a particular purpose.

(d)

The Court erred in refusing to correct or even to consider the over-valuations of portions of the plant by the Special Master. These valuations were of new material at high prices, as shown by the Special Master's report, without abatement of price for age or wear. These over-valuations are numerous, amounting to many thousands of dollars.

Ante pages 135-138.
Report, Record 168-180.

The items are set out in the city's exceptions to the Special Master's report.

Record 157-159.

(e)

The Court erred in adopting the Special Master's value of about $608,000.00, estimated at replacement cost of a new plant, as a basis for fixing rates in disposing of this case. It was an excessive valuation reached by erroneous application of the principles of law. Two experts on each side made estimates of

replacement cost of plant 30th of March, 1901. The water company's experts placed this replacement cost at about $618,000.00. The city's experts placed replacement cost at about $400,000.00. The taxable value of the plant was $275,000.00. The city's experts, admittedly of good reputation and well qualified, spent several weeks in investigation of the plant, going into every detail, examining the books of the water company, obtaining and considering local prices, while the water company's experts made a most superficial investigation of the plant, spending only from five to ten days in that work, not inquiring as to local prices, and for the most part accepting the water company's statement as to quantities and prices, and besides their testimony is badly broken on cross-examination by contradictions of their depositions given in another case only a few months before testifying in this case, wherein they had almost universally fixed different and lower prices than in their present estimate.

Under these facts the value of this plant, in testing the reasonableness of the city's rates and the validity of its ordinance, should not have been placed in excess of the $500,000.00 estimate made by the city council at the date of passing the ordinance. Certainly it was not impossible for a fair minded board to reach the conclusion that the city council did reach, and be convinced of its correctness, even if they had had the opportunity and the evidence before them upon which the Special Master based his report.

FOURTH

The Court erred in its action and rulings, with reference to, and in its ascertainment of, the income of the water company for the purpose of testing the reasonableness of the rates in this case in the following particulars, to-wit:

(a)

The Court erred in refusing to look to, or to in any manner consider, or to have the Special Master to consider and report upon, the actual income realized by the water company at its own rates at any period subsequent to the date of the passage of the city ordinance, to-wit, March 30, 1901. The income actually realized by the water company, at its own rates for one and a half years after the date of the passage of the ordinance, had been proved by the water company itself and by Elbert Wheeler, the treasurer of the company, on his examination in chief. The Court refused to look to this proof of the actual income of the company realized upon its own rates, and proved by the treasurer of the water company, for the year 1901-2, or for any other period subsequent to the passage of the ordinance, for any purpose whatever in this case. He refused to require the Special Master to report thereon, treating the fact as entirely irrelevant. The Special Master who had improperly been empowered to settle for himself, the relevant and material issues, closed his eyes to this proof and refused to report

income and operating expenses of the water company for any period subsequent to the date of the passage of the ordinance.

Report, Record 169.

The city excepted to this action of the Special Master.

Exceptions, Record 159-160.

The Court overruled the city's exceptions by written opinion in which he states the grounds of his action.

Opinion, Record 297-8.

The city presented the question a second time by petition to rehear.

Petition to rehear. Record 205-6.

And likewise by another petition for re-committal of the case to the Special Master with direction to report income and operating expenses for the year 1901-2.

Petition for Recommittal. Record 226-230.

This latter petition sets out fully the grounds of the city's contention. Both of these petitions were disallowed by the Court.

Record 291-294.

Thereupon the city entered a motion for a reserva-

tion in the final decree allowing it to make application at any time it might be so advised, to have inquiry made as to whether changed conditions would justly admit of operation under the city's ordinance rates.

Record 293-4.

Under the views of the Special Master, confirmed and adopted by the Court, the income and operating expenses of the water company for the *year preceding the passage of the ordinance,* to-wit, 1900-1, were made the *sole and exclusive test* —a mere mathematical one—of the reasonableness of the city's rates. The income of that year, at the water company's rates when reduced by the estimated per cent of 22.88 to the level of the city rates, is the *mathematical test* that is applied and *the only test that was applied by the Court* in passing upon the reasonableness of the city's rates. All other considerations were excluded from view. When the bill was filed the water company had operated for more than eight months, under its own rates, after the passage of the ordinance. Two quarters of the fiscal year had elapsed. The water company knew precisely what its earnings and operating expenses had been for these two quarters. When the bill was amended in vital matters, December 1st, 1904, in order to aver *value* instead of *cost* of plant and to state that the city rates had, or would continue, after and under the ordinance to deprive the water company of a fair return, it had operated under its own rates

for *more than three and a half years after the date of the ordinance* and knew precisely what its income had been during those years, and whether it was sufficient when reduced to the level of the city's rates, to afford it a fair return. The original bill had confined its averments to the year or period prior to the passage of the ordinance. The amended bill, by its averments covered by general but not specific allegation, the period subsequent to the passage of the ordinance. There was no averment in the original bill, filed more than eight months after the passage of the ordinance, denying that the water company was actually realizing an income sufficient, when reduced to the level of the city's rates, to afford it a fair return. There was no averment in the amended bill stating any facts that would indicate that the water company had not actually received an income after the passage of the ordinance which, when reduced to the level of the city rates, afforded it a fair return.

The amendment, it will be observed, is very general in its terms and states no amounts of income or operating expenses or any other specific fact. The injustice, resulting from this action of the Special Master and of the Court in refusing to consider the income and operating expenses of the plant for any period subsequent to the passage of the ordinance is glaringly apparent when it is stated, as the treasurer of the water company proves, that the income of the plant for the year subsequent to the date of the passage of the ordinance showed an increase of over $8,000.00 over the income of the preceding year, and there is proof tending strongly to prove that the

actual increase was much larger. The operating expenses had increased only slightly, if at all, after eliminating the unusual and notorious illegal item of $1,156.00 for water rates litigation included in the year 1901-2.

Ante pages 149-165.

And this injustice is further emphasized by another fact, that there was during the year preceding the date of the passage of the ordinance about $79,000.00 of construction work done which is embraced in the valuation of the plant as of 30th of March, 1901, but which was not completed and in condition to yield revenue during the year 1900-1. Upon the cost of this construction work done during that year, the Special Master allows interest which enters into his estimate of the value of the plant. By placing this $79,000.00 worth of construction work done during the preceding year, (which was not revenue producing during the year) into the value of the plant, the burden upon the rates of that year, in order to provide 2 per cent for depreciation and 6 per cent for fair return, *was increased the sum of* $6,320.00—that is, 8 per cent upon $79,000.00, for which there was no corresponding earnings.

Report, Record 175.

There is no proof that any part of this construction aggregating $79,000.00 and included in value of plant, done in the year 1900-1, was in a condition *during that*

year to produce one dollar of revenue. It was nevertheless, under the methods adopted, made to burden the revenue of that year and at the same time to increase the value of the plant by an interest allowance as above indicated. On the contrary Mr. Wm. Wheeler admits that the Worthington pump, entering into the cost of that construction at $16,038.00, was not put into use for supplying water and earning revenue until after 30th of March, 1901.

Wm. Wheeler 583.

It is not the city's contention that the income and operating expenses of the year preceding the passage of the ordinance cannot be looked to as evidence, for what it is worth, tending to prove the former revenue producing capacity of the plant, and as a circumstance indicating the amounts that would or should be realized during the succeeding year or years. It would not be improper for the Court and Special Master to look to the income and operating expenses of the plant for any number of years preceding the passage of the ordinance for that purpose, but such evidence would be of little value, especially where, as in this case, the actual earnings during a long period after the passage of the ordinance are accurately known and proved. The city's contention is that the income and operating expenses of the plant for the year preceding the passage of the ordinance, and to which the ordinance does not apply and was not intended to apply, cannot be made the *sole*

and exclusive test by mere mathematical calculation of the reasonableness of the city's rates and the validity of its ordinance, and especially so where the conditions as to earnings and operating expenses for the year have been greatly changed in the succeeding year. The operating expenses for the year 1900-1—the year adopted for test of the city's rates, were abnormally high, growing out of temporary conditions, that did not exist before or after that year, being, in the matter of fuel alone, $2,000.00 in excess of the other years. Another cause of increase of $4,200.00, in operating expenses for this year over the preceding year, was the cost of wrecking the L. B. plant.

F. C. Kimball 2223
E. Wheeler 761-763; 769-70.

The true question is, what was, if test has been actuallly made, or what probably will be, if test has not been actually made, the income of the plant under conditions existing at and after the passage of the ordinance. The court must consider the actual or probable income realized or realizable after the passage of the ordinance and under its rates. If test has been actually made by operation at city's rates, and in some cases tests have been required as a condition precedent to the Court's interference, the question is one of easy solution. If actual test has shown that an adequate income was realized, there could be no possible reason for the Court's interference. If the test is not made—that being a

matter optional with the water company—the question must necessarily be determined by less satisfactory evidence. The Court in its opinion fails to distinguish between causes of unconstitutionality arising from inherent defects in legislation, such as entire want of power to pass any regulating ordinance, and causes of unconstitutionality arising from the *operation* of an otherwise valid ordinance or law. The objection made to the ordinance in this case, so far as it rests upon the confiscatory character of the rates fixed by it, is of the latter character. In cases of former class the legislation is void *ab initio* and is never valid for any purpose. It cannot be vitalized by proof of any character. In cases of the latter character the unconstitutionality or invalidity of the legislation is conditional and depends upon the *operation* of the legislation and its effect upon conditions. It can be invalidated, if at all, by proof that its *operation* produces results of such an extreme character as to confiscate private property. It is and remains valid and ready to take effect whenever conditions will justly admit of its operation. The extent of the Court's interference in such cases is to arrest the operation of the statute until conditions are so changed as to admit of its just and legal operation, but no longer. Both the Special Master and the Court held that this ordinance must be tested as to the reasonableness of its rates (to quote the language of the Court), "Must be determined upon the situation as it was at the time of the enactment of the ordinance into a law. It was at

this time and in view of the facts then existing valid or invalid, and its validity or invalidity cannot be made to depend upon the changes in the situation which might or probably would have resulted during the year subsequent to the passage of the ordinance."

Opinion, Record 297.

Conceding the correctness of this rule as to causes of absolute unconstitutionality, can it be justly and literally applied in cases of conditional unconstitutionality like this one? The ordinance could not lawfully, and did not in fact or by its terms, apply to any period before its passage. It applies and was intended to apply only to conditions to be anticipated as happening "during the years subsequent to the passage of the ordinance." It could not lawfully operate retrospectively and does not purport to do so. But what does the Court mean by conditions existing at the date of the passage of the ordinance? As to the value of the plant the Court's rule is practicable and correct.

Ante pages 127; 128.

But as to the income and operating expenses of the plant it is wholly impracticable and the Court does not in fact apply the rule to these matters. He does not confine his attention to the income and operating expenses of the plant on the very date of the passage of the ordinance, and he should not have done so. That would

have been absurd and impracticable. But he took as the situation existing at the date of the passage of the ordinance, so far as income and operating expenses are concerned, the income and operating expenses of an entire year preceding its passage and made that the sole and exclusive test of the reasonableness of the city's rates, although these rates did not apply and were not intended to apply to that year. But was the year before the passage any nearer the date of the ordinance than the year after its passage? The latter year, not the former, was contemplated for the operation of the city's ordinance rates. The conditions existing in the two years were radically different as regards income and earning capacity of plant. The Court likewise objects to the consideration of facts occurring after the passage of the ordinance as being "merely speculative," but speculation is entirely eliminated if the water company's proof introduced by itself through its treasurer showing actual receipts of the water company for the year 1901-1902 is to be considered. Is not proof of actual receipts under the company's rates for the year 1901-1902 better evidence than like proof for the year 1900-1, to show the reasonableness or unreasonableness of the city's rates? The income of 1901-2, as well as that of 1900-1, is proved in this case by the treasurer of the water company. Why indulge in speculation as to the income of the year 1901-2, when the fact is thus proved? Even counsel for the water company did not entertain the Court's views on this subject, as shown by their amendment of the bill,

so as to embrace the period after the date of the passage of the ordinance.

The Court himself and the Special Master did not in the Chattanooga case adopt or apply the rule by which this case is disposed of. In that case the income and operating expenses of the year succeeding the passage of the ordinance was made the test of the reasonableness of the city's rates so far as that question was one of mathematical calculation. The Court in the Nebraska cases already cited approved and applied the rules here contended for by the city. In those cases the bills were filed before there had been any operation or earnings after the establishment of the rates. In such case the Court had no other data for estimating income and operating expenses for the future than such as had been earned or incurred in the past *up to the date of the filing of the bill.*

In the case at bar there had been more than eight months of operation and earnings before the bill was filed, after the passage of the ordinance, and the amounts of the earnings and operating expenses for that period were known. And if this had been insufficient to produce an adequate income under the city's rates, the fact should have been stated and the amounts shown that indicated that result in the amended bill. When the amended bill was filed the earnings and operating expenses were known for three and a half years after the passage of the ordinance. But in the Nebraska cases the Courts did not declare the law and regulations invalid for all

time, but only arrested their enforcement until conditions should change so as to admit of their just and reasonable operation. This Court likewise took care in those cases to reserve to the public authorities the right at any time, even after final decree, to show such changes in conditions had occurred as to admit of the operation of the law and the rates and to have any obstruction arising from the Court's injunction removed. There is no distinction, as is suggested by counsel in their answer to petition to rehear, between those cases and the one at bar, by reason of anything contained in the Nebraska statute. They were not proceedings under the statute, but bills brought in Federal Court, as is this case, to enjoin rates as being confiscatory. The power of the city in this case was greater even than the power of the commission in those cases. The city can under the law take up the matter of rates and consider and change them at any time and as often as it deems necessary.

In conclusion on this Assignment of Error, it appears from the evidence that at the date of the filing of the bill in this case, and before and after that date, the water company was undoubtedly receiving an income, which after being reduced to the level of the city's rates, did afford to it a sufficient sum to pay operating expenses, and a fair return upon the actual value of its plant.

Ante pages 149-165.

Suppose the fact admitted or proved that the water company actually tested the city rates by putting them

into effect for the year succeeding the passage of the ordinance and that, during that period, it received an income, at the city's rates, entirely adequate to satisfy the demands of a full and fair return, would that be a good and complete defense to this bill?

If not, then what would constitute a good defense? What defense is possible? It is true the fact occurred after the ordinance was passed, but it is also true that it occurred, for eight months before the *bill was filed.* The question in this case is as to the *operation* of the ordinance, and it could not operate until it was passed.

But the burden is on the water company to show clearly and beyond all doubt that the city rates were confiscatory in their operation. It so avers in its amended bill. What support, in the evidence, is there for this amended bill, if proof of the results of actual operation for the period after the date of the ordinance is wholly excluded? The law presumes the rates reasonable and the income adequate.

Now if it is a defense that the water company received, on actual test, an adequate income under the city rates, can it be met and incontrovertibly rebutted by showing that it would not have done so in the preceding year, when there was $8,000 less income, $79,000.00 worth of plant idle and not earning any revenue, and operating expenses practically the same as in the year succeeding?

If no actual test of the city's rates has been made, but the water company has operated under its own rates,

what method of ascertaining income under the city's rates is better than to take the income realized under the water company's rates, for some period after the ordinance went into effect and reduce it by the per cent of difference between the two schedules? Is not this more probably accurate than to take the income of a preceding year, when conditions were wholly different?

It is the truth that the Court wants known. Is it possible that the law is such that it compels the Court to close its eyes to the truth of the transaction, and to strike down, as confiscatory, rates that are in fact yielding a full and fair return, at the very instant that the Court is pronouncing the death sentence against them?

(b.)

The Court erred in failing and refusing to take into consideration for any purpose whatever the fact fully proved that a reduction of rates will necessarily increase consumption and possibly increase earnings or income. The presumption of law is that an increase of consumption and possibly of income may result from a reduction of rates. But the uncontradicted evidence in this case shows that such will be the result.

Ante pages 143; 144.

It may be true that this matter cannot be reduced to dollars, but it is an equitable consideration and one of the circumstances that the Court should have taken into

consideration in determining the reasonableness of the city's rates. It is a matter which any legislative body would take into consideration in fixing rates and was no doubt taken into consideration by the city council. This error is one of the natural results of the Court's confining his attention to the date of the ordinance and the year preceding its passage.

Assignment of Errors, Record 314-15.

(c.)

The Court confirming the Special Master's report erred in refusing to add to the amount of actual collections from water reported by the Master the sum of $208.00, the excess of solvent accounts carried out at the end of the year 1900-1 over the amount of like accounts carried in at the beginning of the year. These accounts were unquestionably a part of the earnings of the year 1900-01.

Ante pages 138; 139.

He erred in like manner in refusing to add to the amount of water collections reported by the Special Master, the income and profits shown by the taps and supplies accounts aggregating for said year $2,300.00 to $2,400.00.

Ante pages 139-143.
Assignments of errors, 315.
Report, Record 181.

(d.)

The Court erred in accepting the result reached by the Special Master through his erroneous methods of dividing the value of the plant and its income and operating expenses between "city proper" and "outside city" whereby the "city proper" was deprived of its due proportion of income, burdened with an undue proportion of operating expenses and required out of the net earnings thus assigned it to bear the burden of depreciation fund and fair return upon a disproportionate valuation of the plant. While the court does not approve these arbitrary methods of division between "city proper" and "outside city," he does accept the result and per cent reached thereby in the determination of the case. There should have been no division at all of the plant or its income and operating expenses. These should have been considered as an entirety for the purposes of this case. But if any division was proper it should have been made for the purpose of assigning to "outside city" a less proportion of income and a greater proportion of operating expenses than was or should be assigned to the "city proper" for obvious reasons. The division made was, moreover, arbitrary, unjust and prejudicial to the "city proper" and its water consumers. This is apparent from the fact that while the net income assigned to "city proper" affords only 5.35 per cent for payment of depreciation fund and fair return upon the value of that portion of the plant

assigned to the "city proper," the amount assigned to "outside city" pays nearly 23 per cent of the value of that part of the plant assigned to "outside city."

Ante pages 115-127.
Assignment of errors, 315-16.
Opinion 299.

(e)

The Court erred in fixing 22.88 per cent as the basis of reduction of income realized during the year 1900-01, at the city's rates in order to ascertain the income at the city's reduced ordinance rates. The true basis for reduction as shown by the proof is 18.5 per cent.

Ante pages 157-159.
Assignment of errors, 316.

FIFTH.

The Court erred in its rulings and decision of questions affecting operating expenses in the following particulars, to-wit:

(a.)

The Court erred in failing and refusing to have the Special Master report and in failing and refusing to look to and consider, for any purpose whatever, the income

and operating expenses for the year 1901-02, or any other period subsequent to the passage of the city ordinance.

Ante pages 149-165.
Assignment of errors 316.

There is full proof on this subject in the record.

Ante pages 149-165.

(b)

The Court erred in failing and refusing to exclude from the category and account of operating expenses as reported and allowed by the Special Master for the year 1900-01, many items such as water rates litigation, cigars, contribution to charitable purposes, to carnivals and to many other purposes not connected with its business. Also the salaries of officers in engineering or construction work while at the same time a liberal allowance is made for engineering in the Master's report of the value of the plant.

Ante pages 144-149.
Assignment of errors, Record 316.
Report 183-185.
Exceptions 161.

SIXTH.

The Court erred in his calculation and decision that the income realizable for the year 1900-1901 under the

city ordinance would be of such inadequate character as to render the city ordinance confiscatory and void. He refused to consider the income and operating expenses of the year 1901-02. The error of the Court in this regard is the result of the Court's erroneous findings and holdings in several particulars, to-wit:

(a.)

In assuming as value of plant its replacement cost and thereby adopting as a basis of value an excessive sum.

Ante pages 127-138.

(b.)

By adopting as the sole and exclusive test of the reasonableness of the rates of the water company the income and operating expenses of the year preceding the date of the passage of the ordinance, refusing to look to or consider the income and operating expenses of the plant for the year after the date of the passage of the ordinance or any other subsequent period. This holding of the Court was very prejudicial for the reason that there had been during the year preceding the date of the passage of the ordinance, construction work done estimated at $79,000.00, which produced little or no revenue during that year, and the year succeeding the date of the ordinance showed an increase of revenue of more than $8,000.-00—operating expenses being about equal in both years.

Ante pages 149-165.

(c.)

In adopting as the full income or earnings of the plant for the year 1900-01 the actual water collections made during that year, refusing to add thereto the sum of $208.00 of solvent accounts collected during the following year, though earned in the year 1900-01. The bill admitted a larger sum of revenue than that adopted by the Court and there were other items of earnings than from water that should have been added to water collections.

Ante pages 138-143.

(d.)

In finding that the net earnings of the plant would pay the water company as fair return only 3.35 per cent, and that this per cent was so inadequate as to render the city ordinance void. This per cent was reached by the erroneous and arbitrary methods adopted by the Master in making divisions of plant and its income and operating expenses and was based upon the amount remaining after two per cent had been deducted for depreciation fund. Treating the plant as an entirety as should have been done, the per cent of fair return is much larger.

Ante pages 112-127, 82, 91, 94-5.

The Court doubtless had in mind a ready-made state-

ment put in by the treasurer of the company tending to show the result stated by him.

E. Wheeler 723.

But when the city undertook to investigate the years covered by this statement objection was interposed by the water company and no investigation of accounts for any year prior to 1899 was permitted and one of the tables that the treasurer had introduced as to former years was excluded. In this situation it must be presumed that the water company received all that it was entitled to in the former years as to which it objected to an investigation. Moreover it appears that this company had from its inception unnecessarily and illegally diverted large sums to other than legitimate purposes. During the first eight years of its existence it paid more than $115,000.00 on interest, although it had expended not over $200,000.00 in the construction of its plant, and its original stock subscription was $200,00.00. There was no necessity to have paid $1.00 of interest if its stock had been paid in. During this period it earned about $209,000.00, as shown by its badly kept books, a sum entirely adequate to have paid its operating expenses and all charges for fair return and depreciation upon any reasonable estimate of the value of its plant. At the date of filing its bill, as shown therein, it was paying interest on $830,000—a sum that is $221,000 in excess of the value of its plant as reported by the Special Master. And it seems to have had ample funds as shown by the "franchise account" to pay

out large sums without inquiry for purposes that its officials are unwilling to avow and unable to explain. But the water company having fixed its own rates with a free hand, must be held to sustain the loss if it fails to make them sufficient to earn an adequate revenue. The loss must be borne by itself and not laid upon the public in such case.

San Diego Water Co vs. San Diego, 62 *Am. St. Rep.*262.

San Diego etc. Co. vs. San Diego, L. & P. Co., 174 *U. S.*, 754; 43 *L. ed.* 1160.

But a deficiency of revenue to provide this depreciation fund for a particular year constitutes a loss to the company and is not an element of value. Losses do not put value into a plant but take it out. It is the value of the plant that is the basis for fixing rates. If the company should capitalize its losses as a basis for fixing rates, the greater the company's losses the more excessive its rates would be. Under such a rule, rates would soon get beyond the reach of regulation and at the same time become intolerably high for the water consumers. The proposition that such losses can be capitalized and made to burden the water consumers of a succeeding year or of a succeeding generation seems to need no answer. The Court had much trouble over this question of depreciation by reason of his failure to distinguish between this depreciation fund and the depreciation complete and incomplete which

represents the difference in value between a new and an old plant.

Opinion 301-304.
Petition to Re-hear, 210-212.

(e.)

In failing to give sufficient weight and effect to the circumstances under which the city's ordinance was passed and its rates established. It appears that the city council acted in perfect good faith with due diligence, and after giving notice to and affording ample hearing to the water company, and after having made the fullest possible investigation. On the other hand the water company acted arbitrarily and refused aid or information in the fixing of its rates. Rates thus fixed are entitled to the highest consideration and should not upon slight grounds be set aside as unconstitutional and void on the ground of unreasonableness.

Ante pages 11-39, 89-92, 95-98.

(f.)

In refusing to consider the question for any purpose as to whether reduction of rates would increase consumption or revenue.

Ante pages 143-144.

SEVENTH.

The Court erred in sustaining the Special Master's rulings on questions of evidence and refusing to overrule and correct the same in the following particulars:

(a.)

Both the Court and Special Master erred in refusing to compel witness William Wheeler to produce on his cross-examination the Wheeler & Parks books which were in his possession showing actual prices and quantities of material used in a large portion of the construction of the plant.

Ante pages 177-179.
Assignment of errors 1313.
Exceptions 161-2.
San Diego Water Co. vs. San Diego, 62 *Am. St. Rep.*, 274.

The city demanded these books for the purpose of attacking the quantities and prices estimated from general experience by Wheeler and Kimball in making up their invested value statement. It may be said that this error is immaterial as the Special Master gave little consideration to this invested value statement. But this statement afforded valuable evidence for the city as it tended even with its over-estimates strongly to confirm the city's experts in fixing the replacement cost of this plant at about $400,000.00 and as tending to show that the

city's estimate of $500,000.00 was not only conservative but high. This estimate aggregated about $711,000.00, but it included, as Mr. Wheeler admits, $175,000.00 of depreciation, thus reducing, even on the basis of his excessive estimates, the original cost of the plant to about $536,000.00. The purpose of securing the Wheeler & Parks books was to show the excessive character of the estimates as to prices and quantity, and the persistent and successful effort to withhold these books indicates very clearly that they would have afforded evidence and valuable evidence, of the excessiveness of Wheeler & Kimball's estimated prices and quantities used in making up their invested value statement.

(b.)

The Court and Special Master erred in attaching too great weight and importance to the opinions of the water company's experts, hastily made up on scant information and slight investigation, without information as to local prices or conditions, and by adopting without material change the statements of the water company's officials as to quantities and prices. In doing this they set up the opinions of two experts, contradicted by two others, to overrule the opinion of the eleven aldermen and the Mayor, deliberately expressed after full investigation.

Exceptions, Record 161.
Railroad vs. Gill, supra
San Diego Water Co. vs. San Diego, 62 *Am. St. Rep.,* 274.

(c.)

The Court and Special Master erred in their application of the law as to the burden of proof in cases of this character. "All doubts as to facts should be resolved in favor of the defendant."

Ante pages 109-110.
Spring Valley, etc., Co. vs. San Francisco, 124 *Fed. Rep.* 599.
San Diego Water Co. vs. National City, supra.

(d.)

The Court and Special Master erred in excluding or refusing to consider the evidence as to income and operating expenses for the year 1901-02.

Ante pages 149-165.

The income and operating expenses of this year were or should have been the crucial test of the reasonableness of the rates prescribed by the city ordinance so far as that question is one of mathematical calculation.

(e.)

The Court erred in rejecting and refusing to consider the evidence showing that reduction of rates would increase consumption and income, and especially in rejecting evidence tending to show the amount of such increase.

Ante pages 143, 144.

(f.)

The Court erred in refusing to consider, in estimating value of plant, serious defects existing in the plant and calculated to affect its efficiency and value.

(g.)

The Court erred in not giving consideration and effect to the fact that the water company withheld information and refused to produce books that would have been of material aid in ascertaining the reasonableness of the city's rates.

(h.)

The Special Master and the Court erred in considering the water company's indebtedness to the city's prejudice.

Ante pages 165-188.

EIGHTH.

The Court erred in other particulars of minor importance set out in the exceptions found on pages 162-164 of the record, all which are relied upon but will not be further discussed in this brief.

Exceptions 162-164.

The water company's exceptions to the Master's report have been sufficiently covered by this brief and will not receive further notice. All of them except one were over-ruled and the one that is sustained involves no considerable amount.

The conclusion is inevitable upon the facts of this record that the water company is receiving annually from the city and its inhabitants from $20,000.00 to $25,000.00 under its own rates in excess of the maximum fair return to which it is under the law entitled. For seven years it has been able to maintain itself in this advantageous position by the injunctive process of the courts, which was obtained upon allegations which as to some branches of the case there is no effort to sustain. In other words it is in the attitude of having abused the extraordinary process of the Courts.

We submit that the final disposition of this case should not be delayed under the circumstances for the purpose of having another report from a Master. Upon almost any possible view of this case the water company has failed to establish the facts that would justify the interference of the Court to set aside legislative action, especially legislative action enacted under the circumstances that attended the passage of the city's ordinance. But if the case should be reversed and the Court should be of the opinion that it should be remanded for a Master's report, we submit that the Court should upon the facts of this record direct the dissolution

of the injunction and put the city's rates into effect. It should be remembered that no form of unjust and illegal exaction or taxation of the public is more odious and oppressive than that resulting from excessive water rates. Such exactions are for water, a prime necessity for poor and rich alike. It is made not for a public but for a merely private end or benefit. It bears as heavily upon the abject poor, as upon the well-to-do, while public taxation rests only upon those who have the means to pay. Inability to pay public taxes does not deprive the citizen of the benefits of government, but inability to pay for water cuts it off from the home and the family. These are considerations that should make the court solicitous to confine taxation by water rates within legal bounds. The exaction by a single company of $20,000.00 to $25,000.00 or more per annum, to which it is not entitled, from the people of the city, and largely from the needy classes, for a prime necessity like water, is not a small grievance and should not be perpetuated longer than is absolutely necessary for its proper consideration by the Courts. We submit that the bill in this case should be dismissed.

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